

(21,923.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 168.

PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN
ERROR,

vs.

INTERNATIONAL COAL MINING COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

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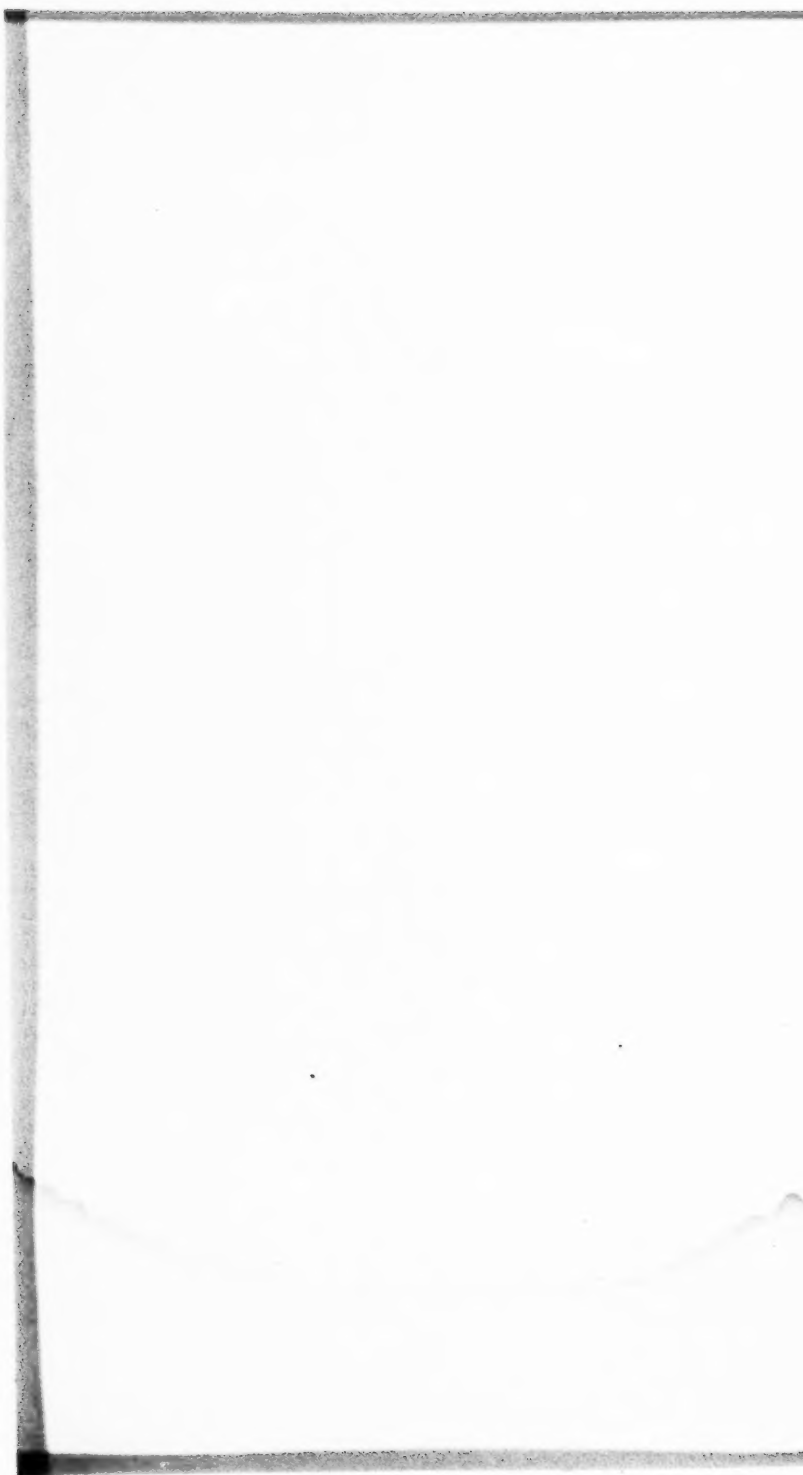
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1

April Session, 1904.

69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

James W. M. Newlin.
Sellers & Rhoads.

- | | |
|---------------|--|
| 1904, July | 29. Præcipe for Summons filed.
Summons exit returnable first Monday of August next. |
| " August | 1. Sellers & Rhoads appear for Defendant. |
| " Sept. | 2. Summons returned served. |
| 1905, Feb. | 14. Statement of Claim filed.
Rule to Plead filed. |
| " " | 28. Demurrer filed. |
| " March | 8. Argued. |
| " " | 8. Ordered that Defendant have leave to file additional Demurrer. |
| " " | 10. Additional reasons in support of demurrer of Defendant filed. |
| " October | 25. Withdrawal of Demurrer to statement and allowance of Court thereon filed. |
| " " | 25. Pleas filed. |
| 1906, January | 24. Replication filed. |
| " Feb. | 19. Affidavit and order of Court granting rule on Defendant to show cause why certain papers, &c., should not be produced, &c., &c. |
| " " | 28. Affidavit and order of court granting an additional rule on Defendant to show cause why they should not produce on the trial certain papers, &c. |
| 2 | |
| " March | 6. Further Replication filed. |
| " " | 7. Defendant's Answer to Plaintiff's rule to show cause why certain papers and writings should not be produced at trial filed. |
| " " | 9. Ordered that the return day sur rule on Defendant to produce certain books be extended thirty days from February 19, 1906. |
| " " | 10. Rule to show cause why Replication should not be stricken off filed. |
| " " | 16. Order granting leave to withdraw Replication filed March 6, 1906. |
| " " | 16. Replication filed by leave of Court. |
| " " | 17. Demurrer to Replication of Plaintiff filed. |
| " " | 21. Answer of Defendant to rule to produce books and papers filed. |

- “ “ 24. Rule to strike off plea of October 25, 1905, filed.
- “ “ 26. Motion and order granting rule to show cause why attachments should not issue against John P. Green, 1st Vice President of the Pennsylvania Railroad Company; J. G. Searles, Coal Freight Agent, Pennsylvania Railroad Company, and Francis I. Gowen. Returnable April 4th, 1906.
- 3 “ “ 26. Certificate of William Clift, Notary Public, filed.
- “ “ 29. Petition of Trustee in bankruptcy to intervene filed.
- “ April 4. Rule to strike off plea of Oct. 25, 1905, withdrawn in open court.
- “ “ 4. Argued sur Demurrer to Replication to special plea of Oct. 25, 1905.
- “ “ 4. Argued sur rule to produce books and papers on trial.
- “ “ 4. Argued sur rules for attachments.
- “ “ 4. Ordered that the prayer of Petition of Trustee in bankruptcy for leave to intervene be granted.
- “ “ 4. Answer of Francis I. Gowen filed.
- “ “ 4. Answer of John P. Green filed.
- “ “ 4. Answer of J. G. Searles filed.
- “ “ 5. Order granting continuance and staying proceedings until further order of court.
- “ Nov. 30. Further Replication to special plea and rule on Defendant to re-join in fifteen days or judgment.
- “ Dec. 13. Demurrer to further Replication to third plea filed.
- “ “ 17. Order for withdrawal without prejudice of rules to produce, etc., granted. February 19th and February 28th, 1906.
- “ “ 17. Argued sur Demurrer to further Replication to third plea.
- 1907, Jan. 21. Second further Replication to special plea filed.

- “ “ 21. Rule on Defendant to re-join in fifteen days or judgment, filed.
- “ “ 30. Affidavit of J. Chester Wilson and order granting rule on Defendant for production of papers, etc., on trial, returnable February 13, 1907, filed.
- “ Feb. 1. Demurrer to second further Replication filed.
- “ “ 13. Answer to rule to produce papers at trial, etc., filed.
- “ “ 21. Plaintiff's depositions against Defendant's answer to rule to produce, etc., filed.
- “ “ 21. Trustee's petition for leave to issue subpoena filed.

- “ “ 21. Order granting rule upon Francis I. Gowen to show cause why he should not be attached for contempt in refusing to obey the subpoena to testify. Returnable February 27, 1907, at 10 o'clock.
- “ “ 21. Order granting rule upon Ellis Ames Ballard and Boyd Lee Spahr to show cause why they should not be required to answer questions certified to the Court by the Notary Public returnable February 27th, 1907, at 10 o'clock.
- “ “ 26. Petition and order granting rule to show cause why statement filed by plaintiff's counsel should not be stricken from the records. All proceedings upon such rule for attachment in the meantime to be stayed, returnable March 6, 1907.
- 5 “ “ 27. Argued sur rules on E. A. Ballard and B. L. Spahr to show cause why they should not be required to answer questions.
- “ March 1. Affidavit of Lewis Neilson filed.
- “ “ 1. Order of Court granting rule to show cause why service of subpoena upon Francis I. Gowen to appear and testify before W. M. Clift at 3.15 P. M. on March 1, 1907, should not be set aside, returnable March 6, 1907.
- “ “ 4. Opinion, Holland, J., overruling Demurrer to Replication filed.
- “ “ 4. Opinion, Holland, J., discharging rule on Ellis Ames Ballard and Boyd Lee Spahr to show cause why they should not be required to answer questions certified.
- “ “ 6. Order to set aside service of subpoena upon Francis I. Gowen to appear before W. M. Clift, Notary Public, at 3.15 P. M., on March 1, 1907, and that the subpoena be returned to the Clerk of the Court.
- “ “ 6. Order to strike from record statement made by Plaintiff's counsel, James W. M. Newlin, on February 21, 1907, certified to and filed by W. M. Clift, a Notary Public, and that said statement be withdrawn from the record by the Clerk of the Court.
- “ “ 11. Order of Court granting rule on Plaintiff to show cause why case should not be stricken from trial list for April Term, 1907.
- 6 “ “ 11. Rejoinder of The Pennsylvania Railroad Company to Plaintiff's Replication filed.
- “ “ 11. Order granting leave to file Rejoinder of The Pennsylvania Railroad Company to Plaintiff's Replication.

- " " 12. Motion to strike off Rejoinder of Defendant filed March 11, 1907, filed.
- " " 13. Argued sur motion to strike off Rejoinder.
- " " 13. Argued sur rule to produce books.
- " " 21. Defendant's costs paid.
- " " 25. Opinion, Holland, J., refusing to strike case from Trial List filed.
- " " 25. Opinion, Holland, J., requiring Defendant to produce books and papers at the trial of the case filed.
- " " 27. Affidavit and order granting rule on Plaintiff to show cause why it should not file a Bill of Particulars.
- " " 27. Petition of Trustee for modification of order of March 25th, 1907, on rule to produce, etc., and order of Court granting rule to show cause, etc., returnable March 29, 1907, at 10 o'clock A. M.
- " " 28. Plaintiff's answer to rule of March 27, 1907, for Bill of Particulars filed.

- " " 29. Argued sur petition for Trustee for modification of order of March 25, 1907.
- " " 29. Argued sur rule for Bill of Particulars.
- " April 3. Opinion, Holland, J., making absolute rule to show cause why Defendant should not produce at the trial certain documentary evidence.
- " " 3. Opinion, Holland, J., directing plaintiff to produce certain books and papers.
- " " 4. Exceptions to orders to produce books entered March 25th and April 3rd, 1907, filed.
- " " 4. Assignments of Error filed.
- " " 4. Petition for Writ of Error allowed and filed.
- " " 4. Bond sur Writ of Error in sum of Five Hundred Dollars approved and filed.
- " " 4. Writ of Error allowed and issued and copy thereof lodged in Clerk's office for adverse party.
- " " 4. Citation allowed and issued.
- " " 8. Citation returned "service accepted."
- " " 15. Notice of orders of March 25, 1907, and April 2, 1907, on rule to produce, etc., and that Plaintiff will on trial claim penalty of judgment by default under R. S. 724 if orders are not complied with.
- " " 19. Præcipe for Transcript of Record sur Writ of Error filed.
- " " 24. Exemplification of Record from the Court of Common Pleas No. 1, in the case of Cresson and Clearfield Coal & Coke Co. vs. International Coal Mining Co. filed.

- " May 1. Stipulation extending time to file Transcript filed.
- " " 15. Order striking off Replication filed January 24, 1906.
- " " 21. Record sur Writ of Error transmitted to Clerk of U. S. Circuit Court of Appeals.
- " Sept. 17. Order to place case on Trial List filed.
- " Oct. 28. Petition of Edward D. McLaughlin, Trustee in Bankruptcy of the International Coal Mining Company under Act of July 20, 1892, and Order of Court refusing prayer of petition.
- " Nov. 4. Order fixing time for examination of Plaintiff's books by Defendant and for return of books to Plaintiff.
- " Dec. 17. Mandate received from U. S. C. C. of Appeals ordering that the Writ of Error be dismissed with costs.
- " " 17. Plaintiff's Bill of Costs filed.
- 1908, Feb. 29. Order to place on Trial List filed.
- " April 1. Plaintiff's Additional Petition for rule on Defendant to produce documentary evidence, &c., filed.
- " " 1. Order granting rule on Defendant to produce documentary evidence filed.
- " " 1. Plaintiff's sur rejoinder to Defendant's rejoinder to Plaintiff's Replications filed by leave of Court.
- 9 " " 1. Rule on Defendant to file Rebutter filed.
- " " 13. Plaintiff's motion to make absolute rule to produce returnable April 13, 1908.
- " " 13. Defendant's Answer to Rule to produce.
- " " 20. Affidavit of service of copy of Plaintiff's sur rejoinder and rule on Defendant to file Rebutter, filed.
- " " 20. Præcipe for judgment against Defendant on Plaintiff's sur rejoinder for want of a Rebutter filed. Judgment accordingly.
- " " 22. Petition for rule on Defendant to show cause why it should not have leave to amend statement filed.
- " " 22. Order of Court granting rule on Defendant to show cause why Plaintiff should not have leave to amend statement, returnable April 24, 1908, at 10 o'clock A. M.
- " " 24. Demurrer of Defendant to Plaintiff's sur rejoinder filed.
- " " 24. Petition for rule to show cause why judgment entered for failure of Defendant to file Rebutter should not be opened, filed.
- " " 24. Answer of Defendant to rule to show cause why Plaintiff should not have leave to amend its statement of claim, filed.

- 10 " 28. Answer of Plaintiff to petition of defendant to open Defendant's judgment for want of Rebutter, filed.
- " 29. Petition to set aside service of subpoena, filed.
- " 29. Ordered that rule to show cause why statement of claim should not be amended be made absolute.
- " 29. And now, to wit, a jury being called, come, to wit (see minutes).
- May 4. Depositions of James W. M. Newlin and William Querus on behalf of Plaintiff sur petition of the Defendant for rule to show cause why judgment entered for failure of Defendant to file a Rebutter should not be opened, filed.
- " 4. Motion on behalf of Defendant for privilege to examine books while in custody of Clerk and order of Court thereon, filed.
- " 4. Motion on behalf of Plaintiff requesting the Clerk to mark letter books, etc., and order of Court thereon, filed.
- " 13. Petition for further order to produce on order of April 2nd, 1907, and order of Court granting rule to show cause, &c., returnable Thursday, May 14, 1908.
- 11 " 13. Answer sur petition of Plaintiff this day filed for order to produce books and papers, also to have included in accountant's report statement of Plaintiff's shipments via Greenwich Pier to points beyond the Delaware Capes, filed.
- May 14. Exceptions to granting of rule to show cause of May 13, 1908, filed.
- " 14. Exceptions of Plaintiff to answer of Defendant to rule of May 13, 1908, filed.
- " 15. Argued sur Exceptions to Answer of Defendant to rule of May 13, 1908.
- " 15. Order dismissing exceptions of Plaintiff to Defendant's Answer to rule to show cause of May 13, 1908, and to rule of May 13, filed.
- " 23. And the jurors aforesaid, upon their oaths and affirmations respectively do say that they find for Plaintiff and assess the damages at Twelve Thousand and Thirteen and 51/100 Dollars (\$12,013.51).
- " 25. Motion and Reasons for new trial filed.
- " 26. Motion for extension of time for filing motion and reasons for new trial filed and Order of Court thereon.
- June 1. Motion and Reasons for new trial on behalf of Defendant, filed.
- " 4. Argued sur motions for new trial.
- " 10. Exception to sealing of defendant's Bill of Exceptions filed.

- “ July 17. Opinion, Holland, J., refusing Plaintiff's and
 12 Defendant's motions for new trial, filed.
 “ “ 24. Præcipe for judgment for Plaintiff, filed. Judg-
 “ “ 24. Bill of Exceptions filed.
 “ “ 24. Assignments of Error filed.
 “ “ 24. Petition for Writ of Error filed.
 “ “ 24. Order allowing Petition for Writ of Error filed.
 “ “ 24. Bond sur Writ of Error filed.
 “ “ 24. Order approving Bond sur Writ of Error filed.
 “ “ 24. Writ of Error allowed and copy thereof lodged
 “ “ in Clerk's office for adverse party.
 “ “ 24. Citation allowed and issued.
 “ “ 27. Citation returned service accepted.
 “ “ 28. Præcipe for transcript sur Writ of Error filed.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of the Circuit Court of the United States for the Eastern District of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you between International Coal Mining Company, Plaintiff, and Pennsylvania Railroad Company, Defendant, a manifest error hath happened to the great damage of the said Pennsylvania Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the twenty-fourth day of July, in the year of our Lord, one thousand nine hundred and eight.

[SEAL.]

GEORGE BRODBECK,
*Deputy Clerk of the Circuit Court
 of the United States.*

Before Holland, J.

Allowed

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

UNITED STATES OF AMERICA, ss:

The President of the United States to International Coal Mining Company, Greeting:

14 You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia within thirty days, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein Pennsylvania Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James B. Holland, Judge, holding Circuit Court of the United States this twenty-fourth day of July, in the year of our Lord one thousand nine hundred and eight.

[SEAL.]

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

Service accepted.

JAMES W. M. NEWLIN,
Attorney for Defendant in Error.

15 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

No. 69, April Sessions, 1904.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Pleas and Proceedings before the Honorable the Judge of the United States Circuit Court for the Eastern District of Pennsylvania.

It is thus contained:

Be it remembered that on the 29th day of July, 1904, comes the plaintiff by its counsel and sues forth a writ of summons against the defendant, which being read, is in the following words and figures, to wit:

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

No. 69, April Sssion, 1904.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Issue summons in assumpsit returnable sec. leg.

JAMES W. M. NEWLIN,
Attorney for Plaintiff.

Col. Samuel Bell, Clerk Circuit Court of United States.
July 26th, 1904.

16 (Endorsed: No. 69, April Session, 1904. U. S. C. C. E. D.
of Penna. International Coal Mining Company, vs. Pennsyl-
vania Railroad Co. Præcipe for Summons Assumpsit. Filed July
29, 1904. Samuel Bell, Clerk. Newlin.)

UNITED STATES,
Eastern District of Pennsylvania, sc:

The President of the United States to the Marshal of the Eastern District of Pennsylvania, Greeting:

We command you, That you summon Pennsylvania Railroad Company, late of your District, if it may be found therein, so that it be and appear before the Judges of the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, in the Third Circuit, at a Session of the same Court to be holden at Philadelphia, on the first Monday of August next, to answer to International Coal Mining Company, in a plea of Assumpsit. And have you then there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 29th day of July, A. D. 1904, and in the 129th year of the Independence of the United States.

[SEAL.]

GEORGE BRODBECK, JR.,
Pro Clerk of Circuit Court U. S.

July 29th, 1904, at Philadelphia, in my district, served the within writ on Pennsylvania Railroad Company by giving a true and
17 attested copy thereof to Lewis Neilson, Secretary of said Com-
pany, making contents known.

So answers

JOHN B. ROBINSON,
U. S. Marshal.

JOS. H. HUDDALL, *Deputy.*

(Endorsed: April Session, 1904. No. 69. Circuit Court. International Coal Mining Co., vs. Pennsylvania R. R. Co. Summons Assumpsit. Filed Sept. 2, 1904. Samuel Bell, Clerk. Returnable on the first Monday of August next. James W. M. Newlin, Attorney for Plaintiff.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

No. 69, April Sessions, 1904.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

SIR: Enter our appearance for above named defendant.

SELLERS & RHOADS,
Att'ys for Def't.

To the Clerk C. C. U. S.
Aug. 1, 1904.

(Endorsed: No. 69, April Session, 1904. C. C. U. S. Mining Co. vs. Railroad Company. Appearance. Filed Aug. 1, 1904. Samuel Bell, Clerk. Sellers & Rhoads, 805 Betz Building.)

18 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

No. 69, April Sessions, 1904.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Plaintiff's Statement.

The plaintiff, International Coal Mining Company, is a corporation organized under the laws of the State of Pennsylvania, for the purpose of mining, producing and preparing for market and also for buying and selling bituminous coal, and having its principal office and place of business within the jurisdiction of this Court, and brings this action against the Pennsylvania Railroad Company, a corporation organized and doing business by virtue of the laws of the State of Pennsylvania, and the plaintiff says:

The defendant is a railroad corporation created by and existing under the laws of the State of Pennsylvania and is and during the whole period covered by this action, was engaged in the transportation of property and persons.

From the first day of April, 1894, to the first day of April, 1901,

the plaintiff was a miner and shipper and purchaser and seller of coal and was in possession of certain quantities of bituminous coal and shipped the same by the said defendant, the Pennsylvania Railroad Company by and over the lines of railway of the said defendant, owned, operated and controlled by it, and the defendant carried the said coal for the said plaintiff from and to the following points of shipment, viz:

19 The mines from which the plaintiff made the shipments are situate in the bituminous coal regions of Pennsylvania and are in what is known to the coal trade as the Clearfield District, and are situated in the counties of Bedford, Clearfield, Clinton, Cambria and Indiana, in the State of Pennsylvania and passing from the mines on the Huntingdon & Broad Top Mountain Railroad to the intersection of the defendant company's road at Huntingdon, Pa.

Also from the mines located on the branch railroads owned by the defendant company, passed to their main lines by way of Tyrone, Bellwood and Cresson, Portage and South Fork, and also from mines located at sidings at Lilly, Bens Creek and Sonman, and said coal was carried by defendant beyond the State of Pennsylvania for the plaintiff.

That the defendant company published and authorized the rates applied to the shipments over the Huntingdon & Broad Top Mountain Railroad.

That the shipments of coal made by the plaintiff and carried by the defendant, and particularly hereinafter referred to and made by the said plaintiff, have been made from the above-mentioned mines in the Clearfield District to the points of delivery hereinafter more particularly set forth in schedule "A" hereto added.

That the defendant has its principal office and place of business within the jurisdiction of this Court and that it leases, owns or controls and operates a line or lines of railroad from the several points in the State of Pennsylvania, above mentioned from which the plaintiff's shipments were made to points without the State of Pennsylvania to South Amboy, in the State of New Jersey and to the other delivery points mentioned in said schedule "A" and as a common carrier was engaged in the transportation of bituminous coal from said named points in the State of Pennsylvania to South Amboy, New Jersey, and through its connections in New York, Massachusetts, New Jersey, Delaware and Maryland to the various

20 points mentioned in schedule "A." which contains the tonnage and manifest or open rate charged by the defendant and paid by the plaintiff thereon.

The quantity of coal shipped by the plaintiff and carried by the defendant as specified in schedule "A" amounted in the period covered thereby to 190,655 gross tons. The plaintiff says that the defendant did then and there and during all the time aforesaid, unduly, unreasonably and unlawfully discriminate against the plaintiff in the transportation of said coal in this, that the defendant to the great injury and damage of the plaintiff did charge, demand, collect and receive from or for the plaintiff, for the transportation of said coal, a sum in excess of that charged and collected by the defendant

from others, from the same place, to the same place, upon like conditions under similar circumstances and during the same period of time, which is forbidden by the Interstate Commerce Acts.

The excess of freight which was paid by or for the plaintiff and collected by the defendant, on said shipments of plaintiff's coal by undue, unreasonable and unlawful discrimination as aforesaid, over and above the sum charged and collected by the defendant from others for like services from the same place, to the same places, upon like conditions under similar circumstances and during the same period of time, amounted to the sum of 15c per ton on 161,753 tons, making \$24,262.95, and amounted to the sum of 45c per ton on 28,902 tons equal to \$13,005.90 the two sums making in all \$37,-268.85.

The plaintiff further says that the variation in the discrimination between 15c per ton and 45c per ton consisted in this, that on all shipments made up to April 1st, 1899, the discrimination was 15c per ton and that after that date it was 45c per ton.

21 The plaintiff further avers that prior to April 1st, 1899, the plaintiff from time to time received rebates from the defendant, varying from 10c to 25c per ton and that the claim made is for a further rebate of 15c per ton and 45c per ton for amounts due by the defendant to the plaintiff in excess of the rebates heretofore paid by the defendant to the plaintiff on account of said shipments.

The plaintiff further avers that when these various rebates were paid by the defendant to the plaintiff, it was continuously represented by the agents of the defendant to the plaintiff that the amount of the rebates thus repaid by the defendant to the plaintiff were the same amounts and no less than what the defendant was from time to time repaying to other shippers and that during all of the said period of shipments the defendant's agents did continuously state to the plaintiff that no other shipper had been paid or was being paid or would be paid any greater rebate than that from time to time, actually paid to the plaintiff.

The plaintiff further avers that these statements were falsely made by the defendant's agents to the plaintiff for the purpose of deceiving the plaintiff and did deceive the plaintiff into supposing that said statements were true and for the purpose of preventing the plaintiff bringing suit against the defendant and in bad faith to enable the plaintiff to claim the Bar of the Statute of Limitations if the plaintiff failed to bring suit within the time fixed for the said statute.

And the plaintiff further avers that during all of the period of the shipments made by the plaintiff and specified in schedule "A" the agents of the defendant constantly notified the plaintiff to make no contracts for the delivery of coal beyond the succeeding April 1st.

The plaintiff further avers that from time to time during the entire period covered by the shipments mentioned in schedule "A" the defendant's agents, with the successful intention of deceiving the plaintiff, did constantly represent to the plaintiff that no shippers

22 were allowed to make overlapping contracts and that no shippers were allowed to have any different rates from the beginning of a new fiscal year on April 1st from the rate charged or to be charged to the plaintiff for similar shipments.

And the plaintiff further avers that it discovered in November, 1904, on the trial of a suit brought by the plaintiff against this same defendant, in the Court of Common Pleas No. 2, of Philadelphia County, to March Term, 1901, No. 362, that the defendant had been in the habit of allowing certain shippers to make overlapping contracts and that upon the false pretense of its being necessary to protect the shippers and consignees under these overlapping contracts from change in the rate of transportation, the defendant granted these shippers or their consignees, rebates varying from 15c to 45c a ton in excess of the net charge, made to the plaintiff on the several shipments made, as set forth in schedule "A."

The plaintiff further avers that this plan of discriminating in favor of shippers under overlapping contracts was a dishonest subterfuge invented by the defendant, by which it sought under the forms of law, to cheat this plaintiff in this regard and also for the purpose of concealing the rebates, with a view to later on pleading the Statute of Limitations against this plaintiff and others situated in like manner and cheated by the defendant in the same way.

The plaintiff further avers that the principal beneficiaries of this scheme, who were shippers, were a corporation known as the Berwind-White Coal Mining Company, with its subordinate concerns, known as the Alexandria Coal Company and the Punxsutawney Coal & Coke Company. Also firms or corporations known as, and calling themselves the Sterling Coal Company, W. H. Piper & Company, Morrisdale Coal Company, Loyal Hanna Coal & Coke Company, Keystone Coal & Coke Company, James L. Mitchell & Company, Mitchell Coal & Coke Company, Columbia Coal Company, Pennsylvania Coal & Coke Company, The Webster Coal & Coke
23 Company, J. C. Scott & Sons, and others.

And the plaintiff further avers that the granting of these rebates complained of in this cause, was a part of a system of the Pennsylvania Railroad Company, and must have been known to the superior officers of those agents of the company with whom this plaintiff had direct relations in getting the rebates, which they did get.

And the plaintiff further avers that by reason of an unlawful combination and conspiracy between the Pennsylvania Railroad Company and its officials on the one hand and competing coal roads on the other hand, to wit: The Reading Railway Company, the New York Central & Hudson River Railway Company and other roads, all of these roads agreed upon a division of the coal business between them, by territorial limitations or division, and by a further agreement amongst themselves, made excessive charges, by the destruction of competition between them during the entire period covered by the shipments mentioned in schedule "A."

The plaintiff further avers that under this division of trade, the Berwind-White Coal Mining Company shipments and those of some

others of the favored shippers, were by this conspiracy of coal carrying roads assigned exclusively to the defendant, the Pennsylvania Railroad Company, and that under this agreement, the entire shipments of the Berwind-White Coal Mining Company were absolutely secured to the Pennsylvania Railroad Company, and these shipments could not have been made by any other road, and hence, the defendant had not even the illegal and unlawful pretence of competition, to be used as an excuse for granting rebates to the Berwind-White Coal Mining Company.

This plaintiff is advised by its counsel, that in these circumstances, it is not obliged to assume the incredible belief that no
24 official of the Pennsylvania Railroad Company was directly or indirectly interested in the rebates granted to the Berwind-White Coal Mining Company, and that it is reasonable to believe that some person or persons, powerful in the management of the Pennsylvania Railroad Company, were individually interested directly or indirectly in getting through the Berwind-White Coal Mining Company some personal pecuniary advantage as a stockholder or otherwise, in the rebates granted to that company.

This suit is brought to recover the sum of \$37,268.85 so as aforesaid illegally collected from the plaintiff with interest on each collection from the date thereof to the time of the verdict.

Second Count.

And the plaintiff further avers that the defendant is a railroad corporation created and existing under the laws of the Commonwealth of Pennsylvania, and is, and during the whole period covered by this action, was engaged in the transportation of property and passengers.

That the said defendant was, and is a common carrier and was and is required at common law to transport the property of the plaintiffs upon reasonable terms therefor.

That between April 1st, 1894, and April 1st, 1901, the plaintiffs being in possession of certain quantities of bituminous coal particularly specified and set forth in exhibit "A" attached hereto, shipped the same by the Pennsylvania Railroad Company directly or through lines operated and controlled by it, and the said defendant carried the same for the plaintiff from the several points of shipment set forth in the said exhibit "A" to the several points of destination therein set forth at the times mentioned therein and for the amount of tonnage mentioned therein as of the respective dates, and that the total number of tons of coal thus shipped during said period was 190,655 tons.

25 The plaintiff says that the defendant did then and there and during all of the time aforesaid, unduly and unreasonably charge excessive freight to the said plaintiff for the transportation of the said coal, in this, that the defendant to the great injury and damage of the plaintiff, did charge, demand, collect and receive from the plaintiff for the transportation of the said coal, sums varying from 15c. per ton to 45c. per ton in excess of a reasonable charge for the said carriage. The excess of freight thus charged over and

above a reasonable charge therefor, amounted to and is the sum of \$37,268.85.

The plaintiff further says that by reason of the premises the said defendant is liable to pay to the said plaintiff the said sum of \$37,268.85 with interest thereon from the time of the said over-payments, and this suit is brought to recover the said sums of money.

The plaintiff further avers that owing to the fraudulent concealment by the defendant of the fact of the excessive charge for transportation thus made to them, the plaintiff was not able to discover and did not discover the fact of the said overcharge to the plaintiff until November, 1904, when the plaintiff ascertained the same on the trial of a suit brought by the plaintiff against this same defendant in the Court of Common Pleas No. 2, of Philadelphia County, March Term, 1901, No. 362.

JAMES W. M. NEWLIN, *Attorney for the Plaintiff.*
INTERNATIONAL COAL MINING COMPANY,

[SEAL.] By J. CHESTER WILSON, *Secretary.*

STATE OF PENNSYLVANIA,

City and County of Philadelphia, ss:

J. Chester Wilson, being duly sworn according to law, deposes and says that he is the secretary of the International Coal Mining Company, the plaintiff above named, and that the facts set forth in the foregoing statement of plaintiff's demand as a basis of their claim are true to the best of deponent's knowledge, information and belief.

J. CHESTER WILSON.

Sworn to and subscribed before me this 14th day of February, A. D. 1905.

[SEAL.]

MARY E. HAMER,
Notary Public.

Commission expires Jan. 25, 1905.

[SEAL.]

FRANK R. BUCHANAN,
Notary Public.

Commission expires March 12, 1905.

SCHEDULE "A."

Statement of Shipments of Bituminous Coal for Account of International Coal Mining Company.

To South Amboy for transhipment by vessel:

	Weight, tons.	Manifest, rate.	Total tons.
April 1, 1894, to April 1, 1895,	7874	1.70 & 1.80	
April 1, 1895, to April 1, 1896,	8519	1.70	
April 1, 1896, to April 1, 1897,	10962	1.70 & 1.35	
April 1, 1897, to April 1, 1898,	4021	1.35 & 1.40 & 1.50	
April 1, 1898, to April 1, 1899,	24430	1.20	
April 1, 1899, to April 1, 1900,	15708	1.35 & 1.40	
April 1, 1900, to July 1, 1900,	3231	1.70 & 1.40	
July 1, 1900, to April 1, 1901,	9963	1.40	84708

27 *Statement of Shipments of Bituminous Coal for Account of International Coal Mining Company.*

From—	To—	Weight, tons.	Manifest, rate.
Tyrone	Mechanicsville, New York	14127	2.00
"	"	3276	
"	"		
Altoona	"	17583	1.80
"	"	251	2.00
"	"	1411	
"	"	2483	
Cresson	"	83	2.00
"	"	10351	
"	"	426	
"	"	148	1.80
"	"	113	
Saxton	"	513	2.00
"	"	595	
"	"	5449	
Bellwood	"	963	

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Tyrone	Albany, N. Y.	84	
Altoona	"	8899	2.00
"	"	1813	
"	"	2288	
"	"	4934	1.80
"	"	967	2.00
Saxton	Albany	28	
"	"	785	
"	"	1206	
Cresson	"	298	

Apl. 1/97 to Apl. 1/98.	Altoona	.....Green Island, N. Y.....	232
Apl. 1/98 to Apl. 1/99.	"	.....".....	882
Apl. 1/98 to Apl. 1/99.	Cresson	.....".....	83
Apl. 1/98 to Apl. 1/99.	Altoona	.....Troy, N. Y.....	287
Apl. 1/98 to Apl. 1/99.	Cresson	.....".....	27
Apl. 1/99 to Apl. 1/00.	Tyrone	.....Poughkeepsie, N. Y.....	29
Apl. 1/96 to Apl. 1/97.	Altoona	.....Pittsfield, Mass.....	834
Apl. 1/97 to Apl. 1/98.	"	.....".....	72
Apl. 1/98 to Apl. 1/99.	"	.....".....	454
29			
Apl. 1/99 to Apl. 1/00.	"	.....".....	27
Apl. 1/97 to Apl. 1/98.	Cresson	.....".....	26
Apl. 1/98 to Apl. 1/99.	"	.....".....	238
Apl. 1/96 to Apl. 1/97.	Altoona	.....Springfield, Mass.....	48
Apl. 1/98 to Apl. 1/99.	"	.....".....	49
Apl. 1/97 to Apl. 1/98.	"	.....".....	51
Apl. 1/98 to Apl. 1/99.	Cresson	.....Lee, Mass.....	847
Apl. 1/98 to Apl. 1/99.	Altoona	.....".....	2.55
Apl. 1/98 to Apl. 1/99.	Cresson	.....Glendale, Mass.....	2.55
Apl. 1/98 to Apl. 1/99.	Saxton	.....S. Farmingham, Mass.....	2.55
Apl. 1/99 to Apl. 1/00.	"	.....Danbury, Conn.....	211
Apl. 1/98 to Apl. 1/99.	"	.....Cambridgeport,	343
Apl. 1/98 to Apl. 1/99.	"	.....Ontario, N. Y.....	29
Apl. 1/99 to Apl. 1/00.	"	.....Amsterdam, N. Y.....	28
Apl. 1/97 to Apl. 1/98.	"	.....Canandaigua, N. Y.....	655
Apl. 1/97 to Apl. 1/98.	Cresson	.....".....	19
Apl. 1/97 to Apl. 1/98.	"	.....Pen Yan, N. Y.....	76
Apl. 1/97 to Apl. 1/98.	"	.....Horseheads, N. Y.....	93
Apl. 1/98 to Apl. 1/99.	"	.....".....	136
Apl. 1/98 to Apl. 1/99.	"	.....".....	68

Apl. 1/98 to Apl. 1/99.	"	Syracuse, N. Y.	242	1.65
Apl. 1/98 to Apl. 1/99.	"	Union Hill, N. Y.	29	1.86
Apl. 1/97 to Apl. 1/98.	"	Rome, Etna & Little Falls.	76	
Apl. 1/99 to Apl. 1/00.	"	Forda, N. Y.	199	
Apl. 1/96 to Apl. 1/97.		Auburn, N. Y.	711	
Apl. 1/96 to Apl. 1/97.		"	504	
Apl. 1/98 to Apl. 1/99.	"	"	44	
Apl. 1/98 to Apl. 1/99.	"	Rome, N. Y.	224	1.75
Apl. 1/98 to Apl. 1/99.	"	Hudson, N. Y.	54	
Apl. 1/99 to Apl. 1/00.	"	Babylon, N. Y.	57	
Apl. 1/96 to Apl. 1/97.		Indian Orchard, Mass.	623	
Apl. 1/97 to Apl. 1/98.	"	"	1174	
32				
Apl. 1/96 to Apl. 1/97.	"	Montpelier, Vt.	43	
Apl. 1/97 to Apl. 1/98.	"	Chatham, Vt.	99	
Apl. 1/95 to Apl. 1/96.	Cresson	Trenton, N. J.	669	2.00
Apl. 1/97 to Apl. 1/98.	"	"	477	
Apl. 1/98 to Apl. 1/99.	"	"	68	1.60
Apl. 1/97 to Apl. 1/97.	Tyrone	"	141	1.85
Apl. 1/97 to Apl. 1/98.	Cresson	"	26	
Apl. 1/98 to Apl. 1/99.	Saxton	"	28	1.60
Apl. 1/99 to Apl. 1/00.	"	Bridgeton, N. J.	30	
Apl. 1/99 to Apl. 1/00.	Cresson	"	29	
Apl. 1/97 to Apl. 1/98.	"	"	21	
Apl. 1/95 to Apl. 1/96.	"	Newark, N. J.	17	2.10
Apl. 1/97 to Apl. 1/98.	"	"	137	
Apl. 1/98 to Apl. 1/99.	"	"	145	1.70
Apl. 1/96 to Apl. 1/97.	Altoona	Jersey City, N. J.	168	
Apl. 1/96 to Apl. 1/97.	Cresson	"	59	

INTERNATIONAL COAL MINING COMPANY.

21

Apl. 1/99 to Apl. 1/00.	"	"	91	
Apl. 1/97 to Apl. 1/98.	"	Phillipsburg, N. J.	27	2.44
Apl. 1/95 to Apl. 1/96.	"	Eatontown, N. J.	88	2.15
Apl. 1/95 to Apl. 1/96.	"	Tennent, N. J.	62	

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Apl. 1/97 to Apl. 1/98.	"	"	18	
Apl. 1/95 to Apl. 1/96.	"	Safe Harbor, N. J.	62	1.65
Apl. 1/95 to Apl. 1/96.	"	"	27	1.65
Apl. 1/95 to Apl. 1/96.	"	Perth Amboy, N. J.	23	2.10
Apl. 1/98 to Apl. 1/99.	"	Absecon, N. J.	74	1.75
Apl. 1/99 to Apl. 1/00.	"	"	28	
Apl. 1/98 to Apl. 1/99.	"	"	25	
Apl. 1/98 to Apl. 1/99.	"	Palmyra, N. J.	29	1.65
Apl. 1/97 to Apl. 1/98.	"	Elmer, N. J.	104	
Apl. 1/96 to Apl. 1/97.	"	Marion, N. J.	29	
Apl. 1/98 to Apl. 1/99.	"	Rockaway, N. J.	76	
Apl. 1/96 to Apl. 1/97.	"	Harrison, N. J.	59	
Apl. 1/97 to Apl. 1/98.	"	Paterson, N. J.	43	
Apl. 1/98 to Apl. 1/99.	"	"	71	1.85
Apl. 1/97 to Apl. 1/98.	"	Passaic, N. J.	64	1.80
Apl. 1/97 to Apl. 1/98.	"	Rahway, N. J.	27	
Apl. 1/97 to Apl. 1/98.	"	Menlo Park, N. J.	22	
Apl. 1/97 to Apl. 1/98.	"	Mays Landing, N. J.	454	
Apl. 1/98 to Apl. 1/99.	"	Palmyra, N. J.	22	1.65

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Apl. 1/97 to Apl. 1/98.	"	Atlantic City, N. J.	189	
Apl. 1/98 to Apl. 1/99.	"	"	70	1.75
Apl. 1/97 to Apl. 1/98.	"	Camden, N. J.	47	

From—	To—	Weight, tons.	Manifest, rate
Apl. 1/98 to Apl. 1/99.	Mt. Holly, N. J.	143	1.70
Apl. 1/97 to Apl. 1/98.	Pleasantville, N. J.	17	
Apl. 1/97 to Apl. 1/98.	Morris, N. J.	40	
Apl. 1/97 to Apl. 1/98.	Glassboro, N. J.	22	
Apl. 1/97 to Apl. 1/98.	Stanwick, N. J.	28	
Apl. 1/97 to Apl. 1/98.	Dover, Del.	29	
Apl. 1/97 to Apl. 1/98.	"	24	
Apl. 1/96 to Apl. 1/97.	Belair, Md.	29	
Apl. 1/96 to Apl. 1/97.	Bolton, Md.	72	1.90
Apl. 1/95 to Apl. 1/96.	Frederick, Rd., Md.	277	1.90
Apl. 1/95 to Apl. 1/96.	"	105	
Apl. 1/96 to Apl. 1/97.	Elkton, Md.	1421	
Apl. 1/97 to Apl. 1/98.	North East, Md.	335	
Apl. 1/97 to Apl. 1/98.	"	18	
Apl. 1/97 to Apl. 1/98.	Elkton, Md.	353	
Apl. 1/97 to Apl. 1/98.	Cockeysville, Md.	1338	1.90
Apl. 1/95 to Apl. 1/96.	"		
Apl. 1/96 to Apl. 1/97.	"	503	
Apl. 1/97 to Apl. 1/98.	"	1306	
Apl. 1/98 to Apl. 1/99.	"	1320	1.50
Apl. 1/95 to Apl. 1/96.	Tarrytown, Texas, & Havre de Grace, Md.	63	1.90
Cresson			
Total.....		105,947	

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(Endorsed: 69, April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Co. vs. Pennsylvania Railroad Company. Plaintiff's Statement. Enter rule on defendant to plead in 15 days or judgment sec. leg. James W. M. Newlin, for plaintiff. February 14, 1905. Col. Samuel Bell, Clerk C. C. U. S. Filed Feb'y 14, 1905. Samuel Bell, Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Pleas.

And now, October 25th, 1905, the above defendant, by its attorneys, Sellers and Rhoades, files the following pleas:

1. Non-assumpsit.
- 37 2. Bar of the Statutes of Limitations.
3. And for a further plea in this behalf the Defendant, by leave of Court, says that the Plaintiff ought not to have or maintain its said action, because, since the institution of the same, to wit, on September 29th, A. D. 1905, in a certain action at law, in which the Cresson & Clearfield Coal & Coke Company was plaintiff, and the Plaintiff herein, the International Coal Mining Company, was Defendant, pending in the Court of Common Pleas No. 1 for the County of Philadelphia to No. 3588. June Term, 1901, of which said action the said Court of Common Pleas had jurisdiction, there duly issued, upon a judgment obtained therein by the Plaintiff against the Defendant, a writ of Fieri Facias, under and by virtue of which the Sheriff of the County of Philadelphia duly and lawfully exposed to public sale or vendue on said September 29th, 1905, All and singular the chartered rights, privileges and franchises of the said International Coal Mining Company, Plaintiff herein, including the franchise and right to be a corporation, together with all property, real, personal and mixed, and all books accounts, claims, choses in action, causes in action, whether arising out of contracts, torts or penalties, and assets of every description, belonging to, or in any way appertaining to said International Coal Mining Company, Plaintiff herein, excepting only lands in fee, and thereupon sold the same to one Patrick H. Walls, all of which appears upon the records of the said Court of Common Pleas No. 1 for the County of Philadelphia, as will appear by an inspection of the same.

Wherefore, this Defendant averring and showing to the Court that, by virtue of said recited proceedings, the corporation formerly the International Mining Company, the Plaintiff in this action, has been dissolved, and all its rights, accounts, claims, choses in action,

cause in action and property of every sort and description
 38 have passed to and been vested in the said Patrick H. Walls,
 prays judgment whether it, the said Plaintiff, should have or
 maintain its aforesaid action against it.

SELLERS & RHOADS,
Att'ys for Deft.

Oct. 25th, 1905.

(Endorsed: 69, Apr. Sess., 1904. C. C. U. S. East Dist. Pa.
 International Coal Mining Company v. P. R. R. Co. Pleas. Sellers
 & Rhoads, for Deft. Filed Oct. 25, 1905. Samuel Bell, Clerk.)

In the Circuit Court of the United States for the Eastern District
 of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
 vs.
 PENNSYLVANIA RAILROAD COMPANY.

Before Holland, J.

And Now, February 19th, 1906, on the filing of the affidavit of
 J. Chester Wilson, Secretary of the plaintiff, the International Coal
 Mining Company, and on motion of James W. M. Newlin, attorney
 for the plaintiff, the Court grant- a rule on the defendants to show
 cause why they should not be required to produce on the trial of
 this cause the papers and writings specified in said affidavit or to
 satisfy the Court why it is not in their power to do so, returnable
 February 28th, 1906, at 10 o'clock a. m.

By the Court.

Attest:

GEORGE BRODBECK, JR., *Pro Clerk.*

39 In the Circuit Court of the United States for the Eastern Dis-
 trict of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
 vs.
 PENNSYLVANIA RAILROAD COMPANY.

STATE OF PENNSYLVANIA,
City of Philadelphia, ss:

J. Chester Wilson, being duly sworn according to law, deposes and
 says that he is the Secretary of the plaintiff, the International Coal
 Mining Company, and that the Pennsylvania Railroad Company,

the defendant in the above cause, has in its possession, power and custody and control, certain statements, claims, receipts, checks, drafts, vouchers and writings which contain evidence pertinent to the issue in the above case, that is to say;

One. All statements or claims in writing made by the Berwind-White Coal Mining Company, the Sterling Coal Company, Morrisdale Coal Company, and Columbia Coal Company, showing shipments of coal made by the said corporations between the 1st day of April, 1894, and the 1st day of April, 1901, by the lines of the defendant the Pennsylvania Railroad Company, between the initial points in Pennsylvania known in the coal trade as the Clearfield District, to South Amboy, and to the various points of delivery of the plaintiff's shipments of coal for the same period of time and between the same points as set forth in the schedules attached to the plaintiff's statement in this cause.

40 The said points of delivery being without the State of Pennsylvania, and in the States of New York, Massachusetts, Connecticut, New Jersey, Vermont, Delaware and Maryland.

And further all claims presented at any time by any of the said corporations to the defendant the Pennsylvania Railroad Company for the payment by or for the Pennsylvania Railroad Company to or for the said corporations of any sum or sums of money on account of previous payments to the Pennsylvania Railroad Company for the said shipment of coal by the Pennsylvania Railroad Company for the said corporations as aforesaid, and also all drafts, checks or orders for money by means of which said payments were made by or on account of the Pennsylvania Railroad Company to the said corporations as aforesaid, and all books of account containing the accounts between the Pennsylvania Railroad Company and the said corporations for such payments, repayments or rebates on freight charges on such coal theretofore transported by the Pennsylvania Railroad Company and paid for on account of said corporation or paid by any consignee of any of the said corporations on account of said shipments of coal.

In connection with the above averment of affiant and the call made thereunder, this affiant attaches to this affidavit a printed copy of the depositions of the officers of all of the said corporations admitting the receipt of rebates from the Pennsylvania Railroad Company on shipments made by said corporation on the lines of the Pennsylvania Railroad Company within the State of Pennsylvania during the same period of time set forth in the plaintiff's statement in this cause.

Two. The said affiant further avers that he has reason to believe and he verily believes that the Pennsylvania Railroad Company, the defendant in the above case, has in its possession, power, cus-

41 tody and control certain statements, claims, receipts, checks, drafts, vouchers and writings which contain evidence pertinent to the issue in the above case, that is to say: statements or claims in writing made by W. H. Piper & Company, Loyal Hanna Coal & Coke Co., James L. Mitchell & Co., Mitchell Coal & Coke Co., Pennsylvania Coal & Coke Co., Webster Coal & Coke Co., J. C. Scott

& Sons, and others showing all shipments of coal made by the said corporations and individuals between the first day of April, 1894, and the 1st day of April, 1901, by the lines of the defendant, the Pennsylvania Railroad Company, between initial points in Pennsylvania known in the coal trade as the Clearfield District, to South Amboy and to the various points of delivery of the plaintiff's shipments of coal for the same period of time and between the same points as set forth in the schedules attached to the plaintiff's statement in this cause, the said points of delivery being without the State of Pennsylvania and in the States of New York, Massachusetts, Connecticut, New Jersey, Vermont, Delaware and Maryland.

And further all claims presented at any time by any of the said last named corporations or individuals to the defendant, the Pennsylvania Railroad Company, for the payment by or for the Pennsylvania Railroad Company to or for the said last named corporations, or individuals, of any sum or sums of money on account of previous payments to the Pennsylvania Railroad Company for the said shipments of coal by the Pennsylvania Railroad Company for the said corporations or individuals last named as aforesaid, and also all drafts, checks, or orders for money by means of which said payments were made by or on account of the Pennsylvania Railroad Company to the said last named corporations or individuals as aforesaid, and all books of account containing accounts between the Pennsylvania Railroad Company and the said corporations or

42 individuals last named for such payments or repayments or rebates on freight charges on such coal theretofore transported by the Pennsylvania Railroad Company and paid for or on account of said last named corporations or individuals, or paid by any consignee of any of the said last-mentioned corporations or individuals on account of said shipments of coal. And further all similar claims by other corporations or individuals not named and payments made on account thereof.

J. CHESTER WILSON.

Sworn to and subscribed before me this 19th day of February,
A. D. 1906.

[SEAL.]

FRANK R. BUCHANAN.

Notary Public.

Commission expires March 12, 1909.

43 In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1905.

No. 286.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY; JOHN LLOYD, Appellant.

Sur Appeal and Certiorari from the Order of June 7, 1905, of the
Court of Common Pleas No. 2 of the County of Philadelphia, of
June Term, 1904. No. 3929.

APPENDIX CONTAINING THE RECORD.

I. *Plaintiff's Statement of Claim.*

Court of Common Pleas No. 2 of Philadelphia County, June Term,
1904.

No. 3929.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Plaintiff's Statement.

The plaintiff, International Coal Mining Company, is a corporation organized under the laws of the State of Pennsylvania, for the purpose of mining, producing, and preparing for market and also for buying and selling bituminous coal, and brings this action against
44 the Pennsylvania Railroad Company, a corporation organized and doing business by virtue of the laws of the State of Pennsylvania, and the plaintiff says:

The defendant is a railroad corporation created by and existing under the laws of the State of Pennsylvania, and is and during the whole period covered by this action, was engaged in the transportation of property and persons.

From the first day of April, 1894, to the first day of April, 1901, the plaintiff was a miner and shipper and purchaser and seller of coal and was in possession of certain quantities of bituminous coal and shipped the same by said defendant, the Pennsylvania Railroad Company, by and over the lines of railway of the said defendant, owned, operated and controlled by it, and the defendant carried the said coal for the said plaintiff from points of shipment in what is known in the coal trade as the Clearfield District in Pennsylvania, to Greenwich Point, Philadelphia, Pa.

The mines from which the plaintiff made the shipments are situate in the bituminous coal regions of Pennsylvania and are in

what is known in the coal trade as the Clearfield District, and are situated in the counties of Bedford, Clearfield, Clinton, Cambria and Indiana, in the State of Pennsylvania, and passing from the mines on the Huntingdon and Broad Top Mountain Railroad to the intersection of the defendant company's road at Huntingdon, Pa.

Also from the mines located on the branch railroads owned by the defendant company, passed to their main lines by way of Tyronne, Bellwood and Cresson, Portage and South Fork, and also from mines located at sidings at Lilly, Ben's Creek, and Sonman, and said coal was carried by defendant for the plaintiff to said Greenwich Point, Philadelphia, Pa.

That the defendant published and authorized the rates applied to the shipments over the Huntingdon and Broad Top Mountain Railroad.

That the shipments of coal made by the plaintiff and carried by the defendant, and particularly hereinafter referred to, have
45 been made from the above-mentioned mines in the Clearfield District to said Greenwich Point as the point of delivery, and said shipments are more particularly set forth in Schedule A, hereto attached, which contains the dates and tonnage and rates charged for said shipments.

The quantity of coal shipped by the plaintiff and carried by the defendant, as specified in Schedule A, amounted in the period covered thereby to two hundred and seventy-nine thousand and ninety-eight gross tons. The plaintiff says that the defendant did then and there and during all the time aforesaid, unduly, unreasonably and unlawfully discriminate against the plaintiff in the transportation of said coal in this: that the defendant, to the great injury and damage of the plaintiff, did charge, demand, collect and receive from or for the plaintiff, for the transportation of said coal, a sum in excess of that charged and collected by the defendant from others, from the same place, to the same place, upon like conditions, under similar circumstances and during the same period of time, contrary to the common law and contrary to the statutes in such case made and provided.

The excess of freight which was paid by or for the plaintiff and collected by the defendant on said shipments of plaintiff's coal by undue, unreasonable and unlawful discrimination as aforesaid, over and above the sum charged and collected by the defendant from others for like services from the same place to the same place, upon like conditions under similar circumstances and during the same period of time, up to April, 1900, amounted to the sum of fifteen cents per ton on two hundred and fifty-seven thousand five hundred and forty-six tons, making \$43,631.90, and amounted after April 1st, 1900, to sixty-five cents per ton on twenty-one thousand five hundred and fifty-two tons, making \$14,008.80, the two sums equaling \$57,640.70.

The plaintiff further avers that prior to April 1st, 1899,
46 the plaintiff from time to time received rebates from the defendant, varying from ten cents to twenty-five cents per ton and that the claim made is for a further rebate of fifteen cents per

ton and sixty-five cents per ton for amounts due by the defendant to the plaintiff in excess of the rebates heretofore paid by the defendant to the plaintiff on account of said shipments.

The plaintiff further avers that when these various rebates were paid by the defendant to the plaintiff, it was continuously represented by the agents of the defendant to the plaintiff that the amount of the rebates thus repaid by the defendant to the plaintiff were the same amounts and no less than what the defendant was from time to time repaying to other shippers, and that after April 1st, 1900, no rebates were paid to anyone, and that during all of the same period of shipments the defendant's agents did continuously state to the plaintiff, that no other shipper had been paid or was being paid or would be paid any greater rebate than that from time to time actually paid to the plaintiff.

The plaintiff further avers that these statements were falsely made by the defendant's agents to the plaintiff for the purpose of deceiving the plaintiff, and did deceive the plaintiff into supposing that said statements were true and that defendant made these false statements for the purpose of preventing the plaintiff bringing suit against the defendant, and they were made in bad faith to enable the defendant to claim the bar of the Statute of Limitations if the plaintiff failed to bring suit within the time fixed by the statute.

And the plaintiff further avers that during all of the period of the shipments made by the plaintiff and specified in Schedule A the agents of the defendant constantly notified the plaintiff to make no contracts for the delivery of coal beyond the succeeding April 1st.

The plaintiff further avers that from time to time during the entire period covered by the shipments mentioned in Schedule A, the defendant's agents, with the successful intention of deceiving the plaintiff, did constantly represent to the plaintiff that no shippers were allowed to make overlapping contracts, and that no shippers were allowed to have any different rates from the beginning of a new fiscal year, on April 1st, from the rate charged or to be charged to the plaintiff for similar shipments.

And the plaintiff further avers that it discovered in November, 1904, on the trial of a suit brought by the plaintiff against this same defendant, in the Court of Common Pleas No. 2, of Philadelphia County, to March Term, 1901, No. 362, that the defendant had been in the habit of allowing certain shippers to make overlapping contracts, and that upon the false pretense of its being necessary to protect the shippers and consignees under these overlapping contracts from change in the rate of transportation, the defendant granted these shippers or their consignees rebates varying from fifteen cents to sixty-five cents a ton in excess of the net charge made to the plaintiff on the several shipments made, as set forth in Schedule A.

The plaintiff further avers that this plan of discriminating in favor of shippers under overlapping contracts was dishonest subterfuge invented by the defendant, by which it sought under the forms of law to cheat this plaintiff in this regard and also for the purpose of concealing the rebates, with a view, later on, to pleading the

Statute of Limitations against this plaintiff and others situated in like manner and cheated by the defendant in the same way.

The plaintiff further avers that the principal beneficiaries of these schemes who were shippers, were a corporation known as the Berwind-White Coal Mining Company, with its subordinate concerns, known as the Alexandria Coal Company and the Punxsutawney Coal and Coke Company. Also firms or corporations known as and calling themselves the Sterling Coal Company, W. H. Piper & Co.,
48 Morrisdale Coal Company, Loyal Hanna Coal and Coke Company, Keystone Coal and Coke Company, James L. Mitchell & Co., Mitchell Coal and Coke Company, Columbia Coal Company, Pennsylvania Coal and Coke Company, the Webster Coal and Coke Company, J. C. Scott & Sons, and others.

And the plaintiff avers that the granting of these additional rebates complained of in this cause, was a part of a system of the Pennsylvania Railroad Company, and must have been known to the superior officers of these agents of the company with whom this plaintiff had direct relations in getting the rebates, which they did get, in common with the trade generally, and which agents of defendants made to plaintiff the false statements above mentioned.

And the plaintiff further avers that by reason of an unlawful combination and conspiracy between the Pennsylvania Railroad Company and its officials on one hand and other competing coal roads on the other hand, to wit: the Philadelphia and Reading Railroad Company, the New York Central and Hudson River Railroad Company, and other roads, all of these roads agreed upon a division of the coal business between them, by territorial limitations or division, and by a further agreement amongst themselves made excessive charges through the destruction of competition between themselves during at least part of the entire period covered by the shipments mentioned in Schedule A.

The plaintiff further avers that under this division of trade, the Berwind-White Coal Mining Company shipments and those of some others of the favored shippers, were by this conspiracy of coal-carrying roads, assigned exclusively to the defendant, the Pennsylvania Railroad Company, and that under this agreement the entire shipments of the Berwind-White Coal Mining Company were absolutely
49 secured to the Pennsylvania Railroad Company, and these shipments could have been made by any other road, and hence the defendant had not even the illegal and unlawful pretense of competition, to be used as an excuse for granting rebates to the Berwind-White Coal Mining Company.

This plaintiff is advised by counsel that in these circumstances it is not obliged to assume the incredible belief that no official of the Pennsylvania Railroad Company was directly or indirectly interested in the rebates granted to the Berwind-White Coal Mining Company, and that it is reasonable to believe that some person or persons powerful in the management of the Pennsylvania Railroad Company were individually interested, directly or indirectly, in getting through the Berwind-White Coal Mining Company some personal pecuniary

advantage as a stockholder or otherwise, in the rebates granted to that company.

This suit is brought to recover the sum of \$57,640.70 so as aforesaid illegally collected from the plaintiff with interest on each collection from the date thereof to the time of the verdict.

Second Count.

And the plaintiff further avers that the defendant is a railroad corporation created and existing under the laws of the Commonwealth of Pennsylvania, and is, and during the whole period covered by this action was, engaged in the transportation of property and passengers.

That the said defendant was and is a common carrier, and was and is required at common law to transport the property of plaintiff upon reasonable terms therefor.

That between April 1st, 1894, and April 1st, 1898, and between July 1st, 1900, and March 18th, 1901, the plaintiff, being in possession of certain quantities of bituminous coal particularly specified and set forth in Exhibit A, attached hereto, shipped the same
50 by the Pennsylvania Railroad Company directly or through lines operated and controlled by it, and the said defendant carried the same for the plaintiff from the several points of shipment in the Clearfield region in Pennsylvania, set forth in the said Exhibit A, to Greenwich Point in Philadelphia, Pa., as the point of destination therein set forth at the times mentioned therein and for the amount or tonnage mentioned therein as of the respective dates, and that the total number of tons of coal thus shipped during said period was 279,098 tons.

The plaintiff says that the defendant did then and there and during all of the time aforesaid, unduly and unreasonably charge excessive freight to the said plaintiff for the transportation of the said coal, in this, that the defendant, to the great injury and damage of the plaintiff, did charge, demand, collect and receive from the plaintiff for the transportation of the said coal from April 1st, 1894, to April 1st, 1898, the sum of fifteen cents per ton, and from July 1st, 1900, to March 18th, 1901, the sum of sixty-five cents per ton in excess of a reasonable charge for the said carriage. The excess of freight thus charged over and above a reasonable charge therefor, amounted to and is the sum of \$57,640.70.

The plaintiff further avers that by reason of the premises the said defendant is liable to pay to the said plaintiff the said sum of \$57,640.70, with interest thereon from the time of the said overpayments; and this suit is brought to recover the said sums of money.

The plaintiff further avers that owing to the fraudulent concealment by the defendant of the fact of the excessive charge for transportation thus made to it, the plaintiff was not able to discover, and did not discover the fact of the said overcharge to the plaintiff until November, 1904, when the plaintiff ascertained the same on the trial

51 of a suit brought by the plaintiff against this same defendant in the Court of Common Pleas No. 2, of Philadelphia County, March Term, 1901, No. 362.

JAMES W. M. NEWLIN, *For Plaintiff.*
INTERNATIONAL COAL MINING
COMPANY,

(Signed) By J. CHESTER WILSON,
[SEAL.] *Secretary.*

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

J. Chester Wilson, being duly sworn according to law, deposes and says that he is the secretary of the International Coal Mining Company, the plaintiff above named, and that the facts set forth in the foregoing statement of plaintiff's demand as a basis of their claim are true to the best of deponent's knowledge, information and belief.

(Signed) J. CHESTER WILSON.

Sworn to and subscribed to before me, this twenty-third day of February, A. D. 1905.

(Signed) FRANK H. BUCHANAN,
[SEAL.] *Notary Public.*

March 12th, 1905.

EXHIBIT A.

Statement of Shipments of Bituminous Coal, for Account of International Coal Mining Company, to Greenwich Piers, Philadelphia, Pennsylvania, from Clearfield Region, Pennsylvania.

April 1, 1894, to April 1, 1895:

	Weight; tons.	Manifest, rate.	Total tons.
Cuba	15,723	1.30	
Porto Rico	650		
Mexico	612		
Savannah, Ga.	720		
New Jersey and New England ports	19,091		
			36,796

April 1, 1895, to April 1, 1896:

Cuba	50,815		
Mexico	2,339		
N. J. & N. E. Ports.....	52,462		
			105,616

April 1, 1896, to April 1, 1897:

Cuba	28,587	1.45-28-20	
N. J. & N. E. Ports.....	12,427		
			41,014

April 1, 1897, to April 1, 1898:

Cuba	56,433	1.20-.88	
N. J. & N. E. Ports.....	17,687		
			74,120

July 1, 1900, to March 18, 1901:

Cuba	1,754		
N. E. Ports.....	19,798		
			21,552
			<u>279,098</u>

II. Rule for More Specific Statement of Claim.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

53 A. J. County, being duly sworn according to law, doth depose and say that he is the assistant secretary of the Pennsylvania Railroad Company, the defendant named in the above suit, and on its behalf he deposes and says that he is advised, believes, and so suggests to the Court, that the statement of claim in the above case is insufficient, in this:

1. Because the statement of demand is defective and insufficient in that it fails to designate:

(a.) The point of origin of the various shipments set out in the schedule attached to the statement.

(b.) The date when such shipments were made.

(c.) The rate of freight paid thereon.

(d.) The net rate paid on such shipments after deducting from the rate charged the allowances or adjustments subsequently made as referred to in the statement.

A. J. COUNTY.

Sworn to and subscribed before me this ninth day of March, 1905.

LEWIS NEILSON,
Notary Public.

[SEAL.]

Commission expires February 28th, 1909.

(Endorsed: 3929. June Term, 1904. C. P. No. 2. International Coal Mining Co. v. P. R. R. Co. Rule on plaintiff to show cause why a more specific statement should not be filed. And now, March 9, 1905, on consideration of the written affidavit and on motion of Sellers & Rhoads, attorneys pro defendant, rule entered on plaintiff to show cause why a more specific statement should not be filed. All proceedings to stay. Rule returnable Mon., March 13, 1905, 10 p. m. N. S. B., J. Sellers & Rhoads, for Def't.)

54 III. *Answer to Rule for More Specific Statement of Claim.*

To the Honorable the Judges of the said Court:

The answer of the International Coal Mining Company to the above stated rule, respectfully shows:

1. Respondent avers that all the information which the defendant claims it needs to have furnished to it is already in its possession, and respondent charges that the rule to show cause was not applied for in good faith for the purpose of enabling the defendant to plead or to go to trial, but that the rule was applied for in bad faith to harass and annoy the plaintiff and to put the plaintiff to unnecessary expense and to delay the trial of the cause.

2. Respondent now further in detail answers each allegation contained in the defendant's affidavit on which the rule to show cause was obtained.

It is alleged therein that the statement is insufficient because "it fails to designate"

(a.) "The point of origin of the various shipments set out in the schedule attached to the statement."

The plaintiff shows that this allegation is not true, and that it is not true appears from the face of the plaintiff's statement, which gives the very information which the defendant claims it needs to have furnished to it. The following references to the plaintiff's statement demonstrate this.

Page 1 states that the shipments were "from what is known in the coal trade as the Clearfield District in Pennsylvania, to Greenwich Point, Philadelphia, Pa."

Page 2 names the counties in which the mines were situated as "Bedford, Clearfield, Clinton, Cambria and Indiana, in the State of

55 Pennsylvania, and passing from the mines on the Huntingdon and Broad Top Mountain Railroad to the intersection of the defendant company's road at Huntingdon, Pa." This page of the plaintiff's statement further shows that shipments were "Also from mines located on the branch railroads owned by the defendant company, passed to their main lines by way of Tyrone, Bellwood and Cresson, Portage and South Fork, and also from mines located at sidings at Lilly, Ben's Creek and Sonman, and said coal was carried by defendant for the plaintiff to said Greenwich Point, Philadelphia, Pa."

(b) "The date when such shipments were made."

Respondent says that as to the shipments to Greenwich Piers, they are given in Exhibit A by years from April 1st to April 1st of the years named, from the Clearfield region to Greenwich Piers.

The points of final destination are also given, which enables the defendant to distinguish the shipments.

Respondent further avers that as to all of these shipments specified on Schedule A to Greenwich Piers, defendant has in its possession, accounts kept with respondent, which accounts show every single shipment in all of the period covered by this Schedule A, and giving

the number of tons carried from the Clearfield region day by day as the shipments were made.

Respondent further says that it is advised by counsel that to put all of the details of these daily shipments into the plaintiff's statement would be putting into the plaintiff's statement evidence to be produced on the trial from the books and papers of the respondent which do not have incorporated in the plaintiff's statement, and all of which information in exactly the same detail as the respondent has it, the defendant now has.

And the respondent further says that the books of the defendant are so kept that those in charge of them can with perfect ease tick off the shipments now without further information from the respondent, and verify the same.

(c) "The rate of freight paid thereon."

Schedule A shows that the rate of freight paid on the shipments is distinctly set forth under the column "Manifest Rate" which gives the very information which the defendant says it needs in order to plead or go to trial.

(d) "The net rate paid on such shipments after deducting from the rate charged the allowances or adjustments subsequently made as referred to in the statement."

The respondent answering says that all of the information alleged to be necessary to be furnished by the respondent to the defendant under the head of (d) is already in the possession of the defendant, and in further explanation thereof, the respondent says that the course of business between the respondent and defendant during the period of the shipments sued on was as follows:

The respondent would pay the open rate called in Schedule A "Manifest rate" and would from time to time during a particular year make an application to the defendant for the allowance of rebates, on the charges theretofore paid. With this demand the respondent in each case furnished an itemized list of the individual shipments, and then a lump sum was allowed and was repaid by the defendant to this respondent on the basis of the detailed information as to shipments furnished by respondent.

Respondent further says that these statements thus furnished by the respondent to the defendant on getting rebates from time to time were before the said rebates were paid compared with the books and papers in the possession of the railroad company to ascertain whether the respondent's claim was correct as to the detail of the shipments, and that information and those books and papers were then in the possession of the defendant and on information and belief respondent avers that they are still in the possession of the defendant and readily accessible.

Respondent avers that all the rebates paid to the respondent consisted of lump sums that were known to defendant based really upon the allowance of so much per ton, and that the net amount paid is an arithmetical proposition to be defined by deducting from the total payment the amount of rebate allowed, and the balance is the net rate charged, and this information the defendant always had and still has, and it is readily accessible in its own books and papers,

which are in the custody of the very persons who made the settlements, and who were examined on this subject as to other periods of time, in November, 1904, in this Honorable Court, in another suit between respondent and defendant covering a different period of time.

Respondent further avers that the so-called allowances or adjustments were commonly designated in that way, because the defendant had a disinclination to use the plain English word rebate, the same being forbidden by law, and the practice being forbidden also. There were no other adjustments or allowances unless perhaps in some very trifling things where error might occur. On the contrary, the position of the respondent and other shippers, and the whole trade with the defendant, was this, that every shipper went back to the railroad company and got all he could get, and in the case of the respondent, the respondent was deceived by the railroad company into supposing that it got back as much as the most favored shipper, and that no one else got any more, directly or indirectly, either by rebate or by being charged a net lower rate.

To illustrate this, in connection with overlapping contracts allowed to certain favored shippers and denied to the respondent in the circumstances set forth in the statement, the course of
58 business was thus: Take the year 1899 and compare it with 1900 and 1901. The open rate from the Clearfield District to Greenwich Piers for 1899 was fifty-five cents per ton, on which a rebate was allowed and paid to respondent of ten cents per ton, making a net rate of forty-five cents per ton. The respondent was forbidden to make contracts overlapping the following 1st of April, but the favored shippers were allowed to do so. The practical effect was this. In 1900 the open rate from the Clearfield District to Greenwich Piers was raised to one dollar and ten cents, and no rebate was allowed, and the same condition of things existed in the year 1901, the rate being one dollar and ten cents, or more than double the rate of the year 1899. The shipper having overlapping contracts was charged forty-five cents per ton net for 1900 and 1901, and respondent was charged one dollar and ten cents net.

Respondent further avers that the cost to the railroad company for the service rendered in 1900 and 1901 was no greater than the cost for 1899, and the increase in the rate was the result of a conspiracy between the coal carrying roads to charge this identical increased rate, and to divide the coal shipments by territorial areas so that no road would cut into another.

THE INTERNATIONAL COAL MINING
COMPANY,

(Signed)
[SEAL.]

By J. CHESTER WILSON, *Secretary.*

STATE OF PENNSYLVANIA,
City of Philadelphia, ss:

J. Chester Wilson, being duly sworn according to law, deposes and says that he is the secretary of the respondent, the International

Coal Mining Company, and that the statements contained in the foregoing answer in so far as they are of his own knowledge
59 are true and in so far as they are stated on information and belief he verily believes the same to be true.

(Signed)

J. CHESTER WILSON.

Sworn to and subscribed before me this tenth day of March, A. D.
1905.

(Signed)

BENJAMIN H. RENSHAW,

[SEAL.]

Notary Public.

Commission expires February 13th, 1909.

IV. *Pleas.*

The defendant pleads:

1. Non-assumpsit.

2. Bar of the Statute of Limitations.

3. And for a further plea in this behalf the said defendant says:
That the plaintiff ought not to have or maintain its action, because
it says that on the fourth day of March, A. D. 1901, to March Term,
1901, No. 362, said plaintiff instituted an action against it in this
Honorable Court to recover damages alleged to have been sustained
by said plaintiff because of the same matters and things complained
of in the first count of the statement filed herein, for and in respect
to the shipments of coal made by the plaintiff over the same lines
of the defendant company from the same points of origin to the
same points of destination as the shipments involved in the present
action, which said shipments of coal were made within the period
between April 1st. 1898, and July 1st, 1900, a part of the period
covered by the plaintiff's claim in this action; that the cause of action
asserted in and by the first count of said statement existed at the time
of the institution of said precedent action, and that the facts claimed
to have given rise to the same were known to the said
60 plaintiff at the time of the institution of said action, and
that the said claim could and should have been asserted in
said action. And this defendant further says that the said action
thus instituted to March Term, 1901, was so proceeded in that a trial
thereof was had and a verdict rendered therein in favor of this
defendant, which said verdict was rendered upon the merits and is
still in force and unreserved. And this the said defendant is ready
to verify.

Wherefore it prays judgment whether the plaintiff ought to have
or maintain its action against it.

SELLERS & RHOADS,
Of Counsel for Defendant.

March 30th, 1905.

(Endorsed: 3929. June Term, 1904. C. P. No. 2. Mining
Co. v. R. R. Pleas. Sellers & Rhoads, Atty's for def't.)

V. Motion to Amend Statement of Claim and Add a Third Count.

And now, May 9th, 1905, comes the plaintiff, by James W. M. Newlin, its attorney, and moves the Court for leave to amend its statement, as follows:

Strike out of the first count the claim based on shipments made between July 1st, 1900, and March 1st, 1901, and add an additional count as follows:

Third Count.

And the plaintiff further avers that the defendant is a railway corporation created and existing under the laws of the Commonwealth of Pennsylvania, and is, and during the whole period covered by this action was, engaged in the transportation of property and passengers.

61 That from the first day of July, 1900, to the eighteenth day of March, 1901, the plaintiff was a miner and shipper and purchaser and seller of coal, and was in the possession of certain quantities of bituminous coal and shipped the same by the said defendant, the Pennsylvania Railroad Company, by and over the lines of railway of the said defendant, owned, operated and controlled by it, and the defendant carried the said coal, to wit, twenty-one thousand five hundred and fifty-two tons of coal, for the said plaintiff from points of shipment in what is known in the coal trade as the Clearfield District in Pennsylvania to Greenwich Point, Philadelphia, Pa.

The plaintiff further says that the defendant did then and there and during all the time aforesaid, unduly, unreasonably and unlawfully discriminate against the plaintiff in the transportation of said coal, in this, that the defendant, to the great injury and damage of the plaintiff, did charge, demand and collect and receive from or for the plaintiff for the transportation of said coal a sum in excess of that charged and collected by the defendant from other shippers from the same place to the same place, upon like conditions under similar circumstances and during the same period of time, contrary to the common law and contrary to the statute in such cases made and provided.

The excess of freight which was paid by or for the plaintiff and collected by the defendant on said shipments of plaintiff's coal mentioned in this third count by undue, unreasonable and unlawful discrimination as aforesaid over and above the sum charged and collected by the defendant from other shippers for like services from the same place, to the same place upon like conditions under similar circumstances and during the same period of time, amounted to not less than fifty-five cents per ton on twenty-one thousand five hundred and fifty-two tons, making not less than \$11,853.60, and this suit is brought to recover the said sum of money, with interest from the payment thereof.

62 And now, May 15th, 1905, on motion of James W. M. Newlin, for plaintiff, a rule is granted to show cause why the

plaintiff should not have leave to make the amendment set forth in the foregoing motion, returnable Monday, May 22nd, 1905.

VI. Demurrer to Third Count of Statement of Claim.

The defendant demurs to the third count of the plaintiff's statement of demand and assigns the following reason in support thereof:

1. The said count is defective and insufficient in that it fails to give the names of the shippers for whom it is alleged this defendant carried coal at lower rates than those which it charged and received from the plaintiff.

SELLERS & RHOADS,
Counsel for Defendant.

June 12, 1905.

STATE OF PENNSYLVANIA,

City and County of Philadelphia, ss:

Lewis Neilson, being duly sworn according to law, deposes and says that he is the secretary of the Pennsylvania Railroad Company, the defendant in the above suit, and on its behalf he deposes that the said demurrer is not interposed for delay.

(Signed)

LEWIS NEILSON.

Sworn to and subscribed before me this twelfth day of June, 1905.

(Signed)

A. J. COUNTY,
Notary Public.

[SEAL.]

Commission expires 21st January, 1909.

63 We certify that in our opinion said demurrer is well founded in point of law.

SELLERS & RHOADS,
Counsel for Defendant.

(Endorsed: 3929. June Term, 1904. C. P. N- 2. Mining Co. v. R. R. Demurrer to plaintiff's third Count of Statement. Sellers & Rhoads, for Def't.)

VII. Rule to Amend Third Count of Statement of Claim.

And now, June —, 1905, on motion of James W. M. Newlin, for the plaintiff, the Court grant- a rule to show cause why the plaintiff should not amend the third count of its statement by adding to the third paragraph of the third count the following additional averment:

The plaintiff further avers that the facts herein-above set forth are all within the knowledge of the said defendant, and that by reason of the secrecy of the discrimination practiced by the defendant against the plaintiff, the plaintiff cannot give the names of all of the

shippers benefited by said unlawful discrimination, but plaintiff further avers that some of the beneficiaries of this unlawful scheme who were shippers were a corporation known as the Berwind-White Coal Company, with subordinate concerns connected or controlled by it, and firms or corporations known as and calling themselves the Sterling Coal Company, W. H. Piper & Co., Morrisdale Coal Company, Loyal Hanna Coal and Coke Company, James L. Mitchell & Co., Mitchell Coal and Coke Company, Columbia Coal Company, Pennsylvania Coal and Coke Company, The Webster Coal and Coke Company, J. C. Scott & Sons, and others.

64

Reasons for Motion.

Plaintiff, by leave of Court, filed a third count and omitted to state the names of the favored shippers.

The plaintiff is advised by counsel that as the facts are peculiarly within the knowledge of the defendant, the plaintiff is not obliged to name the favored shippers, and that the decision of the Supreme Court of the United States in the Beef Trust case sustains this contention.

The defendant, however, has demurred to the third count because the names of the favored shippers are not given, and the demurrer is for argument on Monday, June 19th.

Leave is now asked for rule to show cause why this amendment should not be made so as to avoid an unnecessary complication in the case, the pleadings in which are already abnormal.

(Endorsed: No. 3929. June Term, 1904. C. P. No. 2. International Coal Mining Co. vs. Pennsylvania Railroad Company. Rule to amend third Count Rule granted, retble. sec. reg. M. S. June 13-05. Filed June 13, 1905. MacC. Newlin.)

VIII. *Plea to Third Count of Statement of Claim.*

The defendant as to the third count of plaintiff's statement of demand pleads "non-assumpsit."

SELLERS & RHOADS,
For Defendant.

Phila., Pa., July 5th, 1905.

(Endorsed: No. 3929. June Term, 1904. C. P. No. 2. International Coal Mining Co. vs. Pennsylvania Railroad Co. Plea of Defendant as to third Count of Plaintiff's Statement of Demand. Sellers & Rhoads, for Defendant.)

65 IX. *Rule on Behalf of Plaintiff to Take Depositions on Eight Days' Notice.*

Enter rule on behalf of the plaintiff to take depositions on eight days' notice.

JAMES W. M. NEWLIN,
For Plaintiff.

March 30th, 1905.

X. Certified Questions Refused by Witnesses John Lloyd and John C. Bradley.

MAY 2D, 1905 — 3.30 p. m.

Present:

Mr. Newlin, Mr. Gowen, and Mr. Sellers, of Counsel; John C. Bell, Esq., for John Lloyd, a witness.

WILLIAM QUERNS, SWORN.

(Subpœna produced, shown witness, and marked "Exhibit 1" of this date.)

By Mr. NEWLIN:

Q. Did you serve this subpœna on George B. Roberts?

A. I did.

Q. At what place?

A. At his office, 100 Girard Building.

Q. When did you serve it?

A. About 11 oclock today.

Q. You served it on him personally?

A. Personally.

Q. Did he say he would come?

A. He said that he would be over at his office, and you could send over for him if you wanted him.

66 JOHN LLOYD, recalled.

Mr. NEWLIN: Mr. Newlin desires it noted that he contends the witness is not entitled to appear by counsel.

By Mr. NEWLIN:

Q. You said that the coal mined by the Alexandria Company was purchased and afterward shipped by your company, part of it coming from the Clearfield region to Greenwich Point and other points in Philadelphia. I desire to know whether your company in the same period of time, between the same points, shipped any coal purchased from other mining companies than the Alexandria?

A. We were operating other companies.

Q. I want the names of the other companies, in addition to the Alexandria, that you either operated, or brought their product and shipped it?

A. The Latrobe Coal Company, the Henrietta Coal Mining Company, the Altoona Coal and Coke Company, and the Alton Coal Company.

Q. Any others?

A. I do not recall.

Q. Did you mine coal?

A. Not the Columbia.

Q. The Columbia Company has its own cars, had it not?

A. No sir.

Q. Did these companies that you have mentioned, whose product you took, purchased and transported, have their own cars?

A. They did not.

Q. None of them?

A. No.

Q. I thought you said that is where the wheelage question came up?

A. No; I guess you did not ask me a question of that kind. We did not own any cars, none of our companies.

67 Q. Was your coal, then, that we are now speaking of, carried on cars furnished by the railroad company?

A. Yes, sir; the Pennsylvania Railroad Company.

Q. Exclusively their cars?

A. We may have had some Reading cars sometimes put in at various mines.

Q. I mean there were not private cars?

A. No; there were not any private cars.

Q. Neither your company nor any of the companies that you have named had private cars of their own?

A. They did not have any private cars.

Q. Were all their shipments made exclusively on cars of the Pennsylvania Railroad?

A. Not exclusively. We were furnishing Cumberland Valley supply coal, but most of the cars that we got were Pennsylvania Railroad cars at the various mines.

Q. I will ask you whether any officer or director of the Pennsylvania Railroad Company is a stockholder in the Columbia Coal Company?

Mr. GOWEN: I renew my objection to that question, upon the ground that it relates to no matter at issue in this case.

Mr. NEWLIN: Mr. Newlin replies that it has been shown that the Columbia Coal Company received rebates, and that it is proposed to show that in this company and other coal mining companies persons connected with the Pennsylvania Railroad Company were stockholders during the period covered by the plaintiff's shipments, and that they thus were interested in the result of these rebates.

Mr. BELL: Mr. Bell objects on behalf of the witness and as his counsel to the question. The information sought is of a
68 purely private nature, concerns only the Alexandria Coal Company and the other companies referred to, and is not relevant to the issue trying. As counsel for the witness, he therefore objects to the question as irrelevant, immaterial and improper.

Mr. NEWLIN: Mr. Newlin asks that the question be certified to the Court, so that it may be passed upon.

Q. All the repayments made by the Pennsylvania Railroad out of freight charges collected on shipments made by the Columbia Coal Company, whatever repayments were made in that way covered also coal that your company purchased and then shipped, but purchased from any of the companies that you have just named?

A. Yes, sir.

Q. In your books is there any separate account kept showing on account of what particular coal company's product the rebates or repayments were allowed, or was it simply a transaction between the Columbia Coal Company and the railroad company?

A. The transaction was between the Columbia Coal Mining Company and the railroad.

Q. These other companies did not figure in it at all?

A. No.

JOHN C. BRADLEY, recalled.

By Mr. NEWLIN:

Q. Your testimony was that you had some cars of your own?

A. Yes, sir.

Q. You were asked about wheelage?

A. Yes, sir.

Q. Have you consulted your counsel as to whether you should answer the question?

A. I have.

Q. What does he advise?

A. He advises me not to answer.

Mr. NEWLIN: Mr. Newlin states that he offers to prove by the examination of the question of allowances by the railroad company to owners of private cars, that the allowances made to them were in excess of any reasonable allowance for the use of the cars, and that they were for such an amount that, taken in connection with the other rebates that this witness had admitted were received from the railroad company, the Sterling Coal Company could have sold for less than cost and made a profit on it, and that in this respect it was a discrimination against the plaintiff, and that this treatment in connection with the Sterling Company and other companies drove the plaintiff out of business, because it was impossible for it, upon the freight charges that it paid after allowing for what it got back in rebates to sell coal at a profit.

Mr. Newlin further states that on Monday next he will ask for an attachment against the witness Roberts, who has not appeared.

Adjourned until May 9th, 1905, at 3:30 p. m.

At the request of counsel for plaintiff, I hereby certify that the foregoing questions were put to John Lloyd and John C. Bradley, witnesses, and that they declined to answer, by advice of counsel. As above noted, and this certificate is made, at the request of counsel for plaintiff, in order that the Court may pass upon the validity of the questions.

[SEAL.]

WM. M. CLIFT,

Notary Public.

My commission expires February 27th, 1909.

(Endorsed: 3929. June Term, 1904. C. P. No. 2. International Coal Mining Co. vs. Pennsylvania R. R. Co. May 2, 1905. Certified questions which John Lloyd and John C. Bradley refused to answer. Filed May 2, 1905. MacC. Newlin.)

XI. Rule to Show Cause Why Service of Subpoena on William A. Patton Should Not Be Set Aside.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

A. J. County, having been duly sworn, deposes and says:

1. I am assistant secretary of the Pennsylvania Railroad Company.

2. That there is pending in this Honorable Court, an action entitled as above, in which the plaintiff is claiming to recover damages from the defendant therein, alleged to have resulted from the charging by it of alleged excessive and discriminate rates on shipments of coal made by the plaintiff from certain points within the State of Pennsylvania to Philadelphia, between April 1st, 1894, and April 1st, 1898, and between July 1st, 1901, and March 18th, 1901, respectively, all of which will appear from the plaintiff's statement of demand, a copy of which is hereto attached.

3. That to said action the defendant files pleas, copies of which are also attached hereto.

4. That on the thirtieth day of March last the plaintiff entered a rule to take depositions on eight days' notice, which said rule was in form following:

71 "Common Pleas No. 2, June Term, 1904.

"No. 3929.

"INTERNATIONAL COAL MINING COMPANY

VS.

"PENNSYLVANIA RAILROAD COMPANY.

"Enter rule on behalf of the plaintiff to take depositions on eight days' notice.

"JAMES W. M. NEWLIN,
"For Plaintiff.

"To Prothy. C. P.

"March 30th, 1905."

5. That the plaintiff has caused to be served a subpoena, requiring his attendance as a witness, upon one of its officers, William A. Patton, assistant to the president, notwithstanding the fact that under and by virtue of the law pertaining thereto and of the rules of this court, the officers of the defendant cannot be required to so testify.

(Signed)

A. J. COUNTY.

Sworn and subscribed to before me this second day of May, A. D. 1905.

(Signed)

LEWIS NEILSON,
Notary Public.

[SEAL.]

Commission expires 26 February, 1909.

(Copy of statement of claim attached.)

(Copy of pleas attached.)

And now, May 2d, 1905, upon consideration of the foregoing affidavit, upon motion of Sellers & Rhoads, counsel for the Pennsylvania Railroad Company, a rule is granted upon the plaintiff to show cause why the service of the subpoena upon the said William

A. Patton should not be set aside. Returnable to Monday,
72 May 8th, 10 a. m. All proceedings to stay in the meantime.
(Signed) M. S.

XII. Plaintiff's Answer to Rule

To Show Cause Why the Service of a Subpoena upon William A. Patton Should Not Be Set Aside.

To the Honorable the Judges of the said Court:

The answer of the Plaintiff, the International Coal Mining Company, respectfully shows:

1. William A. Patton was subpoenaed in his individual capacity, and not as an officer of the Pennsylvania Railroad Company. The original subpoena is hereto attached and marked "A."

Respondent is advised by counsel that the affidavit presented on behalf of the rule does not state sufficient ground for granting the rule and that the mere service of a subpoena upon an individual who happens to be an officer of the defendant company is not necessarily illegal, and that the question depends upon the facts as to which he is to be examined.

2. Respondent further says that the said William A. Patton was not subpoenaed as an officer of the Pennsylvania Railroad Company, nor for the purpose of asking him any questions concerning his acts as an officer of the Pennsylvania Railroad Company, nor as to the official acts of any person in the employ of the Pennsylvania Railroad Company, nor as to any information acquired by him by reason of his being an officer of the Pennsylvania Railroad Company. The said Patton was subpoenaed for the purpose of establishing a fact within his own knowledge, to wit, that he was during a part of the time covered by the plaintiff's shipments a stockholder

in the Alexandria Coal Company, whose coal has been shown
73 by the testimony of John Lloyd to have been purchased by the Pennsylvania Railroad Company. In this connection it is shown by the testimony of the same John Lloyd, who is an officer of the Alexandria Coal Company, and who is also an officer of the Columbia Coal Company, that the latter, though not a mining company, purchased the coal mined by the following companies, viz., Alexandria Coal Company, Latrobe Coal Company, Henrietta Coal Mining Company, Altoona Coal and Coke Company, and the Alton Coal Company.

This coal was then shipped between the same points as the plaintiff's shipments, by the Columbia Coal Company, and in Mr. Lloyd's testimony it is admitted that during the same period the Columbia Coal Company received rebates from the Pennsylvania Railroad Company.

It further appears from the plaintiff's statement page 5, "That the granting of these additional rebates complained of in this cause was a part of a system of the Pennsylvania Railroad Company, and must have been known to the superior officers of those agents of the company," and further, on pages 5 and 6, the plaintiff states that it is reasonable to believe that some person or persons, powerful in the management of the Pennsylvania Railroad Company, were individually interested, directly or indirectly, in getting, through the Berwind-White Coal Mining Company, some personal pecuniary advantage as a stockholder or otherwise in the rebates granted to that company."

In taking testimony under the present rule it was admitted by the Berwind-White Coal Mining Company that it had received rebates and that it was interested in the Alexandria Coal Company, and it was further shown that William A. Patton was a stockholder in the Alexandria Coal Company, and that it is the intention of the respondent to examine William A. Patton and other persons individually, for the purpose of showing that during the period covered

74 by the plaintiff's suit the said Patton and others, officers and directors of the Pennsylvania Railroad, were stockholders or in some way interested in the Columbia Coal Company and the Alexandria Coal Company and the Berwind-White Coal Mining Company. This does not concern their official acts for the railroad company, but relates to their personal holdings of stock in other corporations. This inquiry is also entirely pertinent because on the trial in November last of another action by this respondent against the Pennsylvania Railroad Company it was shown that various shippers got rebates, particularly through overlapping contracts which extended beyond the freight year, and which contracts these shippers were allowed to make by the Pennsylvania Railroad Company.

When the rates were raised, which took place on one occasion, April 1st, 1900, they were raised from fifty-five cents a ton to a dollar and ten cents a ton between Clearfield and Greenwich Piers, the plaintiff paid one dollar and ten cents per ton and the Berwind-White Coal Mining Company and other companies admitted that on their overlapping contracts at that period they paid the one dollar and ten cents and got back fifty-five cents, whereas, this respondent paid one dollar and ten cents and got back nothing.

The railroad claims that it was a legitimate business transaction to increase its trade, and the proposed examination of William A. Patton and others similarly situated is for the purpose of showing that they, while officers of the Pennsylvania Railroad Company, were directly interested through stock ownership in coal companies in getting for their own benefit part of these rebates.

Respondent further shows that the companies getting these rebates, particularly at the time named, on overlapping contracts, could afford to sell their coal for much less than it cost the plaintiff or the favored shipper to mine it, and so selling it could make a large profit on the rebate at prices that would cause a great loss to this respondent company as shipper.

75 It is not proposed to show by Mr. Patton and the other officers and directors of the Pennsylvania Railroad Company that any rebates were paid by the Pennsylvania Railroad Company, but it is proposed to show by them one single fact, viz., that they were stockholders in certain coal companies, and then the proof of the granting of the rebates has already been made in these very depositions by calling the officers of the Columbia Coal Company and other coal companies, and the proposed examination of the single point indicated is not an examination of the defendant in advance of trial without leave of Court specially given.

THE INTERNATIONAL COAL MINING
COMPANY,

By ————,
[SEAL.] (Signed) J. CHESTER WILSON, *Secretary*.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

J. Chester Wilson, being duly sworn according to law, deposes and says that he is the secretary of the International Coal Mining Company, the above-named respondent, and that he makes this answer on their behalf and by their authority, and that the statements of fact contained in the foregoing answer are true to the best of his knowledge and belief.

(Signed)

J. CHESTER WILSON.

Sworn and subscribed to before me this fifth day of May, A. D. 1905.

(Signed)
[SEAL.]

FRANK R. BUCHANAN,
Notary Public.

Commission expires March 12th, 1909.

76

A.

(*Subpœna to Witness.*)

EXHIBIT 1.—5/4/05. W. M. C.

COUNTY OF PHILADELPHIA, ss:

The Commonwealth of Pennsylvania.

Harry A. Berwind, 305 Betz Building & 2112 Walnut Street.

5/2. William A. Patton, Penna. Railroad Bldg.

F. G. Cassatt, Arcade Bldg.

5/2. Geo. B. Roberts, David E. Williams Co., 100 Girard Bldg.

C. C. Watt, Loyal Coal Co., 2100 Land Title Bldg.

Greeting:

We command you, that setting aside all manner of business and excuses whatsoever, you be and appear in your proper person before William M. Clift, Notary Public, Room 438 Land Title Bldg.,

Phil'd'a., on the 2nd day of May, 1905, at 3.30 o'clock p. m. of that day, then and there to testify all and singular those things which you shall know, in a certain action pending and undetermined between International Coal Mining Co., plaintiff, and Pennsylvania R. R. Co., defendant, on the part of the said plaintiff.

And this you are not to omit, under the penalty of one hundred pounds each.

Witness the Honorable Mayer Sulzberger, President Judge of our said County at Philadelphia, the 24th day of April in the year of our Lord one thousand nine hundred and five (1905).

CHAS. H. MANN,

pro Prothonotary.

[SEAL.]

XIII. Rule for Attachment Against William A. Patton.

And now, June 14th, 1905, on motion of James W. M. Newlin for the plaintiff, and upon filing the notary's certificate of
77 deposition taken June 13th, 1905, hereto attached, the Court grants a rule upon William A. Patton to show cause why he should not be attached for contempt for failure to obey the subpoena to appear June 13th, 1905, at 2 p. m., on the taking of depositions in this cause, returnable Monday, June 19th, 1905, at 10 a. m.

M. S.

MAY 31ST, 1905, 3.30 p. m.

Taking of depositions continued until certified questions are determined.

JUNE 13TH, 1905, 2 p. m.

Present:

Mr. Newlin and Mr. Gowen, of counsel.

Mr. Newlin offers in evidence copy of a letter written by himself to Messrs. Sellers & Rhoads, attorneys of record for the Pennsylvania Railroad Company in this cause, as follows:

"PHILADELPHIA, PA., June 10th, 1905.

"International Coal Mining Co. vs. Pennsylvania Railroad Co.

"DEAR SIRS: As I have no answer to my letters concerning the proceedings under Judge Sulzberger's order, and as the time is getting very short, I assume that your clients are not willing to present themselves for cross-examination without subpoena, and I will therefore have them served as witnesses regularly at the time indicated for hearings as mentioned in my letter of yesterday, with this change, that the meeting for Tuesday next, June 13th, is altered to 2 p. m. instead of half-past three p. m.

"The object of the change is this. I have advised my clients that Mr. Patton having been regularly subpoenaed and a rule to discharge the service having been discharged, he is still under
78 subpoena and is obliged without further service to appear at the first adjourned hearing after the order of June 8th, and this will be June 13th at 2 p. m.

"If Mr. Patton does not then attend, I will ask the notary to certify this fact and on the basis thereof will apply for a rule to show cause why an attachment should not issue, and this can be argued the following Monday. This course, however, will not interfere with the examination of other witnesses and their hearing will go on.

"Yours truly,

"J. W. M. NEWLIN.

"Messrs. Sellers & Rhoads, Betz Building, Philadelphia, Pa."

WILLIAM QUERNS, already sworn, recalled.

The following subpoena is produced and marked by the notary "Exhibit 1, 6/13/05. W. M. C."

(*Subpœna to Witness.*)

COUNTY OF PHILADELPHIA, ss:

[Seal of the Court of Common Pleas, Philadelphia, Penna.]

The Commonwealth of Pennsylvania, William A. Patton, John Lloyd, Greeting:

We command you, that setting aside all manner of business and excuses whatsoever, you be and appear in your proper person before William M. Clift, Esq., Notary Public, at his office, Room 438 Land Title Building, in the City of Philadelphia, on the 13th day of June, 1905, at 2 o'clock p. m. of that day, then and there to testify all and singular those things which you shall know, in a certain action pending and undetermined between International Coal Mining Co., plaintiff, and Pennsylvania R. R. Co., defendant, on the part of the said plaintiff.

And this you are not to omit, under the penalty of one hundred pounds each.

Witness the Honorable Mayer Sulzberger, President Judge of our said Court, at Philadelphia, the 12th day of June, in the year of our Lord one thousand nine hundred and five.

R. F. CLAY,
Prothonotary.

(Endorsed: 3929. June Term, 1904. Court of Common Pleas, No. 2, of the County of Philadelphia. International Coal Mining Co. vs. Pennsylvania Railroad Co. Subpœna for 2 p. m. Tuesday, June 13th, 1905. Newlin.)

By Mr. NEWLIN:

Q. State whether you served that subpoena upon Mr. Patton, and if so, when?

A. This morning about nine o'clock.

Q. Did you serve it on him personally?

A. Personally.

Q. Where?

A. At the Pennsylvania Railroad station, leading from the train shed into the general offices.

Q. What efforts did you make to serve that subpoena upon him prior to today?

A. I made, I think, two efforts yesterday.

Q. Where did you go to?

A. The office of the Pennsylvania Railroad.

Q. At a place where you had heretofore served a subpoena on Mr. Patton?

A. Yes, sir.

Q. The clerk in the outer office told you what?

A. He asked me for my name. I gave him my name, and said I was from Mr. Newlin's office and had a subpoena for Mr. Patton.

Q. What did the clerk answer.

80 A. He came back and said Mr. Patton had just stepped out.

Q. Did he say when he would come back?

A. He said he would be back shortly, so I waited a little while. Then he came and said he was engaged. Then I said all right, I would come back about two o'clock. Then he said he was engaged with Mr. Cassatt.

Q. Were you able to reach him?

A. I was not able to reach him until I made service this morning.

Q. How did you know you could find him where you did find him and served him this morning?

A. I found he resides at Radnor. Thinking he would come in on the train in the morning, I waited for him.

Q. You waited for that train at Broad Street Station?

A. Yes, sir.

Cross-examination.

By Mr. GOWEN:

Q. How did you serve him?

A. I told him, "Mr. Patton, I have a subpoena here for you issued out of Court of Common Pleas No. 2, in the International Coal Mining Company vs. Pennsylvania Railroad Company." He said, "When is it?" I said, "Today at 2 p. m., before Mr. Clift." He said, "That is all right." I showed him the subpoena. He saw it for himself.

Mr. GOWEN: Mr. Gowen states that he learned from Mr. Patton of the service of the subpoena upon him this morning, and that under his, Mr. Gowen's advice, Mr. Patton has not attended, this advice being given because of the fact that Mr. Gowen does not think the method of service sufficient nor the subpoena itself authorized. Further, it was a fact that Mr. Patton had engagements in New York for today which rendered his attendance at the meeting
81 this afternoon extremely inconvenient.

Mr. NEWLIN: Mr. Newlin calls attention to the fact that for a former hearing Mr. Patton was subpoenaed, and obtained from the Court a rule to show cause why the service of the subpoena should

not be set aside, and that on June 7th, 1905, the rule to set aside the service of the subpoena had been discharged by the Court. Mr. Newlin further states that no application was made to him to excuse the witness on account of engagements, which he would willingly have acceded to if it had been accompanied with an offer to attend at an adjourned meeting, and he asks the notary to certify the proceedings had before him today, and gives notice to Mr. Gowen that thereupon he will ask the Court for a rule on Mr. Patton to show cause why he should not be attached for contempt in refusing to obey the subpoena.

Adjourned until June 16th, 1905, at 3.30 p. m.

I hereby certify that the foregoing questions were put to William Querns, witness; that the foregoing answers were made by him, and that statements were made by counsel for plaintiff and defendant as above noted, and this certificate is made at the request of counsel for plaintiff, in order that the Court may pass upon the questions thereupon arising.

(Signed)

[SEAL.]

W. M. CLIFT,
Notary Public.

My commission expires February 27th, 1909.

EXHIBIT 1—6/13/05. W. M. C.

(Subpœna to Witness.)

COUNTY OF PHILADELPHIA, ss:

The Commonwealth of Pennsylvania, William A. Patton, John Lloyd, Greeting:

We command you, that setting aside all manner of business and excuses whatsoever, you be and appear in your proper person before William M. Clift, Esq., Notary Public, at his office, Room 438, Land Title Building, in the city of Philadelphia, on the 13th day of June, 1905, at 2 o'clock p. m. of that day, then and there to testify all and singular those things which you shall know, in a certain action pending and undetermined between International Coal Mining Co., plaintiff, and the Pennsylvania R. R. Co., defendant, on the part of said plaintiff.

And this you are not to omit, under the penalty of one hundred pounds each.

Witness the Honorable Mayer Sulzberger, President Judge of our said Court, at Philadelphia, the 12th day of June in the year of our Lord one thousand nine hundred and five.

[SEAL.]

R. F. CLAY,
Prothonotary.

XIV. *Answer of William A. Patton.*

To the Honorable the Judges of said Court:

William A. Patton, for answer to the above rule, says:

1. It is true that at about 9 a. m. of June 13th inst., a paper, which may have been in the form set out in the notary's transcript, was shown to me, and I was informed that it was a subpoena directing my attendance at 2 o'clock that afternoon at the place named therein. No tender of any sum was made to me to cover fees or expenses.

2. Following the service thus made, I consulted my counsel as to my obligation to attend at the time and place named in the subpoena, and was advised that no such obligation rested upon
83 me. The fact also that such attendance would have obliged me to cancel business engagements previously made, which required my presence that day in New York, was a reason why I did not desire to attend unless it was my duty to do so. For both these reasons I did not attend at the taking of the depositions.

3. During the entire period covered by the plaintiff's statement of demand in this case I have been an officer of the defendant company. Prior to February 10th, 1897, I occupied the position of "general assistant" to the president, and since that date I have been "assistant to the president." Any information that I may have as to the matters at issue in this proceeding has been derived by me while and as an officer of the defendant company.

4. In the answer filed by plaintiff to the rule to show cause why service of a previous subpoena made upon me should not be set aside, the purpose for which I was subpoenaed was thus stated:

"The said Patton was subpoenaed for the purpose of establishing a fact within his own knowledge that he was during part of the time covered by the plaintiff's shipments a stockholder in the Alexandria Coal Company."

The depositions taken by the plaintiff have established that the Alexandria Coal Company was not during the period covered by the plaintiff's claim a shipper of coal over the lines of the defendant company, and that all the coal mined by it was sold by it for a fixed sum and delivered at the breaker, and that the price which it received for such coal was in no way affected or determined by the freight rate paid by the purchaser thereof.

Even, therefore, if ownership by an officer of defendant company of stock of a coal company, which was a shipper of coal over the
84 defendant's lines during the period covered by the plaintiff's claim, is a fact which tends to establish that such company received lower than other shippers, the Alexandria Coal Company not having been such a shipper, any inquiry into the question of the personnel of its stockholders is, I am advised, and therefore submit, wholly unwarranted. Consequently, I submit that I am justified in declining to answer any question or to attend at the taking of any depositions, the purpose of which is to show whether at any time I was a holder of stock of the Alexandria Coal Company.

5. I am advised by counsel that (a) there was no rule in force at the time the subpoena was served upon me under which my testimony could be lawfully taken; (b) that the subpoena served upon me in the manner aforesaid was issued without legal right; (c) the purpose of plaintiff in subpoenaing me was to require me to answer, as to private matters having no connection whatever with any matters at issue in the cause; (d) that this court is without jurisdiction in the premises to issue its writ of attachment for my failure to appear as directed by the subpoena.

WILLIAM A. PATTON.

STATE OF PENNSYLVANIA,

City and County of Philadelphia, ss:

William A. Patton, being duly sworn according to law, deposes and says that the facts set forth in the foregoing answer are true and correct to the best of his knowledge and belief.

W. A. PATTON.

Sworn to and subscribed before me this nineteenth day of June, A. D. 1905.

LEWIS NEILSON,
Notary Public.

[SEAL.]

Commission expires 26 February, 1909.

85 XV. *Depositions Filed With the Court Below Pending Rule for Attachment against William A. Patton.*

APRIL 7TH, 1905, 2 p. m.

Depositions on behalf of plaintiff, taken on eight days' notice to the defendant.

Present:

J. W. M. Newlin, Esq., for plaintiff.

F. I. Gowen, Esq., and E. J. Sellers, Esq., for defendant.

FREDERICK McOWEN, sworn.

By Mr. NEWLIN:

Q. You are treasurer of the Berwind-White Coal Mining Company?

A. Yes, sir.

Q. You have been such since 1894?

A. Yes, sir.

Q. Your company operates the Alexandria Coal Company, does it not?

A. No, sir.

Q. Does not your company own a majority of the stock?

A. No, sir at least I do not think they do. They are stockholders in it. They do not operate it.

Q. Your company are stockholders in the Alexandria Coal Company?

A. Yes, sir.

Q. You have the same office?

A. No.

Q. Are they not adjoining you?

A. No.

Q. Do you know who is now secretary of the Alexandria Coal Company?

A. I think it is a man named Buch.

86 Q. Charles, is it not?

A. Charles Buch.

Q. Your company has stock interests in the Punxsutawney Coal and Coke Company?

A. Yes, sir.

Q. Mr. Buch is secretary of that company, too, is he not?

A. No, sir.

Q. Who is secretary of it?

A. Edward J. Strain.

Q. Are not their offices in the same building with yours?

A. The Punxsutawney Coal and Coke Company's office is in our building.

Q. Your building is what?

A. The Betz Building.

Q. The Alexandria Coal Company's office is where?

A. I think their office is in Cassatt & Co.'s building, the Arcade Building.

Q. Is it not a fact that all the tonnage of both those companies is handled by your company, as between yourself and the Pennsylvania Railroad Company, in making shipments?

A. No; nothing of the kind. In the first place, the Punxsutawney Coal and Coke Company does not mine any coal. It is simply a land owning company. It leases land to operators on royalty.

Q. Those operators do their own shipping?

A. Yes, sir.

Q. The Alexandria Coal Company mines coal?

A. Yes, sir; it is an operating company.

Q. Do you know that Mr. A. J. Cassatt is a stockholder in the Alexandria Coal Company?

(Objected to.)

A. I do not know.

87 Mr. NEWLIN: Mr. Newlin asks this question because it is in connection with one of the averments in plaintiff's statement, that persons interested in the Berwind-White Company and the Alexandria Coal Company and the Punxsutawney Coal Company are benefited by rebates which had been allowed.

Q. Do you know of Mr. William J. Latta being a stockholder in the Alexandria Coal Company?

A. No, sir.

Q. The Berwind-White Company made shipments from what is called Clearfield region in the years from 1894 to 1901?

A. Yes, sir.

Q. They made such shipments to Greenwich Point, among other places?

A. Yes, sir.

Q. They usually prepaid the freight, did they not?

A. I am not sure whether it was prepaid or not at that time.

Q. Having paid freight on such shipments to the Pennsylvania Railroad, your company did from time to time get repayments on some account from the railroad Company?

A. Yes, sir.

Q. Those repayments were predicated upon the freight that had been paid?

A. I would put it on the other end. They were based part of the time on the contracts on which the coal was shipped.

Q. What do you mean by that, contracts with shippers or with the railroad company?

A. With shippers.

Q. You are speaking now of overlapping contracts?

A. Yes, sir.

Q. Without going into the reasons for the repayments of freight, or on account of freight that had been paid, there were such repayments from time to time on claims made by your company to the Pennsylvania Railroad Company?

88 A. Yes, sir.

Q. When those repayments were made, and as a basis of making them, your company made certain statements to the Pennsylvania Railroad Company as the basis of the repayment, did they not?

A. I cannot say that they did.

Q. Did you not furnish to the Pennsylvania Railroad Company some written statement showing the basis upon which you asked to have a repayment of money that had been paid for freight?

A. We recorded contracts that were not filled when the rates were changed. There was a change of rate made, I do not know at what time. We recorded all contracts we had in existence at that time. On that basis we were allowed to fill those contracts at the old rate.

Q. There were other grounds, were there not, on which repayments were asked from time to time, other than overlapping contracts?

A. Not to my knowledge.

Q. You were examined as a witness in the case of the United Coalieries against the Pennsylvania Railroad, were you not?

A. I was.

Q. Do you recall in that case saying that there were readjustments made on account of freight that had already been paid, and that those readjustments were for the correction of clerical errors and for making allowances for various reasons that you specified in that examination other than overlapping contracts?

A. I do not remember having said that.

Q. Be the reasons what they may, you did from time to time receive back money from the railroad company which had been paid for freight, leaving the reasons out?

A. That is pretty broad. It is a hard question to answer.

Q. Answer it in your own way. What is the difficulty of answering it?

89 A. If the railroad makes an overcharge against us we make a claim for that overcharge, no matter what the basis is. If it is simply an overcharge of freight, for instance, we send coal to Philadelphia and they charge us more than the rate, we would make a claim for rebate.

Q. They never charge you more than the open tariff sheet?

A. Sometimes they do. There are mistakes occurring all the time.

Q. That is, clerical errors?

A. Yes, sir.

Q. That was an unusual thing, was it not?

A. That is the usual thing. The other is unusual.

Q. Then you mean it was the usual thing for the railroad company to charge you more than their published tariff?

A. No; not to charge us more; but there are constantly errors occurring in the quantity of coal we ship. Sometimes coal is reconsigned after the freight has been charged. Then we make a claim for the freight charged on it, and pay the freight to the new destination.

Q. But irrespective of the reason given for making the repayment, whenever a repayment was made you did present something in writing in the way of a statement to the railroad company as a basis of what you claimed should be repaid or credited, as the case may be. That is a fact, is it not?

A. Not always.

Q. Was it not generally the case?

A. No; sometimes with some of the agents we simply notify them. They make a reduction on the next freight bill.

Q. But during that period of time were there not frequent instances in which your company directly made representations in writing to the railroad company, that for the reasons given
90 in those statements you claimed to be entitled to a refund of a certain sum of money?

A. I cannot recollect any, although we may have done so.

Q. I read to you an extract from your testimony in the United Collieries against the Pennsylvania Railroad (page 196): "Q. Would you state that the claim was made for a refund of so much per ton on a given number of tons of coal shipped between given points, giving car numbers and stating why you wanted the refund? Was that the general way? A. Yes, sir." And then that a calculation of the amount asked was included. Is that substantially correct?

A. That would relate to contracts. If we made a bill against the railroad, we would certainly give an explanation of why it was made.

Q. That explanation was made in writing in all cases in which you got money back from the railroad company which had been paid as freight?

A. I would not say in all cases. As I told you before, sometimes the rates are adjusted on bills.

Q. Was not that the customary method of getting the allowance, to state the ground of your claim, and how much you asked?

A. Yes, sir; that would be the customary way if it was adjusted by the freight agent. If it got beyond the freight agent, then we would make a claim on the railroad.

Q. When you had to make a claim on the railroad you did specify the amount of tonnage on which you made the claim, and that you claimed so much. You named what you asked?

A. Yes, sir.

Q. Sometimes you got it and sometimes you did not?

A. Yes, sir.

Q. Those transactions at first were noted in a temporary manner on papers of which you took tissue copies. For instance, you
91 would take a tissue copy of whatever you sent to the railroad company as a basis of repayment?

A. Yes, sir.

Q. Afterward the total tonnage and the total amount repaid was entered in an account which you called the coal account. That is true, is it not?

A. I cannot say that is true.

Q. Were not the totals entered into some accounts kept in your bound books, and not simply in these tissue copies of statements you sent to the railroad?

A. Yes, sir; whatever amounts we got we entered in our books and credited to coal account.

Q. The tissue copies you afterward destroyed. They were only temporary?

A. Yes, sir.

Q. The gross payments made at any particular time were entered in the coal account in those bound volumes of your books?

A. They were entered as received.

Q. Just like any other item of your current business, and those books are still in existence, are they not, covering the period from 1894 to 1901? I am speaking of the bound volumes.

A. Yes, sir.

Q. Those books would show any repayments made by the Pennsylvania Railroad to your company, irrespective of what the repayments were for?

A. No; I do not think they would.

Q. What repayments have been made within your knowledge that would not be included under coal account in the bound volumes you have just mentioned?

A. They would be recorded there in some form. All cash coming into the concern is recorded there, but the minutes of the accounts are kept on tissue sheets, and as payments come in those are crossed off and the cash is credited up to the coal account, but there is no

explanation of it. Therefore, it would not be possible for me to locate them.

92 Q. What I want to get at is that those repayments, irrespective of why they were made, finally got into the bound volumes under what is known as Coal Account?

A. I think they did.

Q. How were they repaid to you—by check of the railroad, or how?

A. I think that the payments were by check of the railroad.

Q. Did you keep any separate account with the railroad company in your books, which showed all these repayments?

A. No, sir.

Q. Are you quite sure you did not?

A. I do not know; I am not the bookkeeper. I am just saying in a general way I have knowledge of that, and I do not think there was any account kept. It was simply credited in our general account, Coal Account. Freight is charged against that account. Anything we got back from that freight would be credited to the account. The particular form or way in which it is done I do not have any knowledge of.

Q. You were speaking a moment ago of overlapping contracts. State what you mean by that?

A. An overlapping contract, I understand, would be a contract that was in existence when a change of rates was made.

Q. It is a fact, is it not, that you were in the habit of making contracts with customers for delivery of coal at a period that would overlap the first of succeeding April?

A. Yes, sir; we frequently do.

Q. You did that during the whole period that I have mentioned, from 1894 to 1901?

A. I cannot say I did that. I say we frequently make contracts running beyond a year. We have customers that will not make a contract unless we make it that way.

93 Q. What is called steamship coal was of that kind, was it not? All those contracts extended to a period beyond the succeeding April 1st, did they not?

A. Most of them did.

Q. That related not only to deliveries outside of the State, but to deliveries in Pennsylvania?

A. Yes, sir.

Q. Give me the names of some of your customers with whom you made contracts between 1894 and 1901, which overlapped the succeeding April 1st?

A. I could not do that from memory.

Q. Do you not remember some of them? Take steamship coal, for instance; steamers that go from Philadelphia. Do you recall any company owning steamers from Philadelphia?

A. It would be in the name of some of the companies. I cannot carry the books of a concern that does business of millions of tons a year in my head, and tell you what contracts existed in any year.

Q. I do not ask that. At any period of the time between 1894

and 1901 did you have any contract with the American Line here for delivery of coal for steamers leaving from this port?

A. I could not say positively, but I think we did.

Q. Do you think of any other company than that one with which you had such contracts?

A. No; I could not think of any in Philadelphia.

Q. Did you not have contracts with other persons, not for steamship coal, but for other consumers, which coal was to be delivered within the State of Pennsylvania, and which came from the Clearfield region?

A. I have no recollection of it.

Q. Take the steamship coal contracts. For what length of time did they usually run?

A. It varied.

Q. They were for a period of years sometimes, were they?

A. Yes, sir.

Q. For how many years?

A. I could not tell you that.

94 Q. It would be as much as two or three years, would it not?

A. Yes, sir.

Q. Sometimes as much as five?

A. I am not familiar with the contracts. That is not in my department.

Q. Who had charge of the making of those contracts for your company?

A. They are recorded in our New York office.

Q. Have you no record of them here?

A. While contracts are in existence we keep a memorandum of them at the office. When we want information we write to the New York office for it. Most of our contracts are in New York.

Q. Your books here, however, would show all deliveries under such contracts made with this State, would they not?

A. No, sir; not now.

Q. They did during part of that period from 1894 to 1901, did they not?

A. You are asking me questions I cannot answer without looking at the books and records. I will simply say I do not know because I do not. They are a complicated set of books. I cannot tell you just exactly how everything was kept in there and how it was recorded.

Q. Who kept those books here and had personal knowledge of the contents of those books during the period mentioned, from 1894 to 1901?

A. Edward L. Myers, our cashier.

Q. Is he still in your employ?

A. He is not living.

Q. Who succeeded him in that work?

A. I think he died in January, 1903.

Q. His work covered the whole of the period that I have asked?

A. Yes, sir.

Q. Who was his principal assistant during that period?

95 A. There were various people working in the office. He had no particular assistant.

Q. Name some of the other clerks that must have with him kept these accounts which you are referring to?

A. Back in those years?

Q. Any clerk prior to 1901, and not earlier than 1894?

A. That department I gave very little attention to.

Q. Who did have charge of that department?

A. He had entire charge of that department.

Q. He did not do it alone?

A. No; he had three or four clerks. Which ones he used on that business I do not know.

Q. Your tonnage during those years was as much as four million tons a year, was it not?

A. Yes, sir.

Q. On those overlapping contracts, where there was a change by increase in the freight charges made after the contract was made and before it expired, your company got the benefit of the old rate, the lower rate, during the entire continuance of this overlapping contract?

A. I think they did.

Q. In 1899 to Greenwich Point the open rate was fifty-five cents, and in 1900 it was doubled or increased to one dollar and ten cents a ton. On that basis I understand that in case of an overlapping contract during 1900 and 1901 you would be charged the former rate of 1899, which was fifty-five cents, and not the one dollar and ten cents which was then the new rate fixed for 1900. That is the fact, is it not?

A. I think that is right. That is not as you stated. We would be charged the new rate, and rebated back to old rate on those overlapping contracts.

Q. But in all cases you did pay the current open rate, the tariff sheet filed under the Interstate Commerce Act, whatever that was?

96 A. I believe so.

Q. Then in the case of an overlapping contract you would have rebated to you the excess over and above the lower previous rate during the same contract?

A. Yes, sir; on that contract. That is, providing that contract was registered with the railroad at the end of the season, when the year ended. I forget just when it was done. That was only done on one occasion when the rates were raised.

Q. When the rates were not raised there was no occasion for doing that?

A. When there was a small advance in freights there was no fuss made, and we paid the advance.

Q. Take the other end of the line. In 1898 to Greenwich Point the published tariff was seventy-five cents, and in 1899 it was reduced to fifty-five cents. That is the other end of the proposition. In such cases, there being an overlapping contract, did your company continue to pay in 1898, when the open rate was seventy-five

cents, the rate for 1897, which was eighty-eight cents. Did you pay the higher previous rate, or did you get the benefit of the reduction?

A. I think we got the benefit of the reduction. I am not certain but I think we did.

Q. So that it only worked one way. If there was a reduction you got the benefit of it, and if there was an increase you were not charged the increase?

A. No.

Q. Some of those overlapping contracts did cover the years 1900 and 1901?

A. I think they did.

Q. Some one in your office could give you a list of those contracts? If you wanted to get that information you would be able to get it, would you not?

A. I do not know whether we have such a list now or not. There was such a list made at the time.

Q. As you made these overlapping contracts, was it not part of your current business to keep some kind of schedule from which you could run along it readily and see just when contracts with your principal customers expired?

A. Yes, sir.

Q. From that you could readily see whether the old rate or the new rate was to be paid?

A. Yes, sir; we always keep a contract on file until it is completed.

Q. Do you not keep those contracts permanently after they expire?

A. No.

Q. You have some record, have you not, that would enable you to show what contracts were overlapping?

A. I do not know that I have.

Q. You mean now in Philadelphia?

A. No, I mean anywhere. We keep a contract as long as it is in force. When a contract is completed we simply let it stand for a little while. If we make a new contract with the party, the old one is destroyed and the new one put on the file. If we do not, the old contract is thrown away. We are done with it.

Q. What is done with the current memorandum, schedule or list, which you keep for your own information from time to time, to see what contracts are running out and when they run out?

A. That is kept in our New York office. They keep a regular file of contracts in force.

Q. Is not that kept after they cease to be in force, as part of their permanent records?

A. Not to my knowledge. I do not think it is, because it would be an accumulation of papers that are useless after the contract has expired and is completed.

Q. If you wanted to get that information now for your own use, for the years 1900 and 1901 as to overlapping contracts, whom would you go to to get the information?

A. I hardly know.

Q. Is there not some general utility man who knows every-
98 thing, and you would ask him where to get it?

A. I would ask in the office if they had any old contracts on file, and if they did have them I would hunt to see if there was anything there.

Q. Whom would you naturally ask?

A. Probably the present bookkeeper.

Q. What is his name?

A. Henry Middleton.

Q. You think he would either know or could find out?

A. If he did not know, he would probably know who did have them.

Q. You spoke of filing with the railroad company these overlapping contracts. Did you file a copy of the contract, or only some memorandum showing the period that it covered, and the name of the person with whom you made the contract?

A. I do not know. That was in charge of Mr. Myers. My impression is that he made up a list of the contracts that were open at the time, in showing the amount of coal due on each, and took that with the contracts to the railroad.

Q. On that rebates were allowed?

A. Yes, sir. They examined the contracts.

Q. Were those contracts reported to the railroad company as soon as they were made, or only at the end of the year or other period when you would ask for a rebate?

A. That I could not say, but I think they were reported when made.

Q. So that when made the railroad company knew that you were making a contract that would overlap the succeeding April 1st. That is true, is it not?

A. I do not know.

Q. They had the information?

A. Most of our contracts of that kind are made by our New York office.

Q. Whether made in New York or not, under the system
99 that you have mentioned they are reported to the company here, the railroad company, for their information as soon as they are made?

A. I think so.

Q. That was the custom, was it not?

A. I do not know. I had nothing to do with the reporting of them.

Q. Do you know whether it was the customary thing?

A. No, I do not. That is done in our New York office. Contracts are made there, and it is my impression that they were reported, although I do not know.

Q. Do you know of any instances in which Mr. Searles, for instance, or Mr. Joyce, objected to your company making contracts that overlapped the first of the succeeding April?

A. I do not know.

Q. You do know, do you not, that April 1st, was the period when any changes in freight rates usually took place?

A. Yes, sir.

Q. The tariff was usually made to last from April 1st to April 1st?

A. Yes, sir.

Q. That was the custom?

A. Yes, sir.

Q. Were all your shipments from the Clearfield region made by the Pennsylvania Railroad Company?

A. I believe so.

Q. Was it practicable for your company to ship coal from the Clearfield region to Greenwich Point by any other road than the Pennsylvania Railroad?

A. I do not know. It is a hard question to answer.

Q. Take the Reading. Take the Reading and its system as a whole. Could it not carry coal from your Clearfield mines and deliver it in Philadelphia at the period I mentioned?

100 A. I do not think it could. It has no connection with our mines.

Q. Could you not have sent it part of the way by the Pennsylvania, and then reached the Reading system?

A. Yes, sir; I could. The roads cross one another at various points. We could send our coal to Harrisburg, and then reconsign it from Harrisburg over the Reading Railroad. I do not know whether it could reach Greenwich or not, where we had our shipping.

Q. You could reach points in Philadelphia?

A. Yes, sir.

Q. So that you could, to points in Philadelphia, have shipped coal from some of your Clearfield mines to be delivered in Philadelphia, either by the Reading or Pennsylvania, if you wanted to?

A. Such a thing was possible, but it was not practicable.

Q. What made it impracticable?

A. I do not know, only that it appeared to be out of the way. We never did it. If it was practicable I think we would have done it. There were times when the Pennsylvania Railroad could not deliver coal that we wanted. We would have been very glad to get another way of delivering if we could have done it.

Q. Did you during the period mentioned ever make any effort to get coal shipped by the Reading from your Clearfield mines, or any of them?

A. Personally, I did not, because that is not my department to see to delivering coal.

Q. But you do know it was over the Pennsylvania, and if any had been by the Reading you would have known it, as a matter of common knowledge?

A. Yes, sir.

Q. As a matter of common knowledge you know it was never done?

A. Yes, sir.

Q. Suppose you state in a general way, in your own way, what

101 kind of a statement was presented to the railroad company, and at what intervals of time, to get rebates back on these overlapping contracts.

A. I could not tell you.

Q. Would you give the name of the company——

Mr. GOWEN: I object to the testimony as to what the statements contained.

Q. The statement would contain, would it not, the name of your customer who was supplied with coal under the overlapping contract?

Mr. GOWEN: Under my objection, you are not obliged to answer the question unless you choose to do so, until the court had determined whether the question is a proper one.

Question repeated.

A. I will say I do not know because I really do not. I would have to give what my impression is. I had nothing to do with the making of those statements, and I do not know anything about them, except an impression, and I could draw a conclusion perhaps like you would. My conclusion might be right and might be wrong.

Q. You do know as treasurer the general course of business, do you not, in this very thing you have testified to?

A. Yes, sir.

Q. I ask you, confining yourself to that general knowledge you thus acquired, whether it is not a fact that in making claims for rebates under overlapping contracts where the rate had been increased, you did present to the railroad company a statement giving the name of your customers to whom the coal was shipped, the amount of the coal shipped, the amount that you paid as the open increased rate, and the amount that you claimed back as a rebate to bring it back to the previous lower rate. Did not the statement contain that information?

102 Mr. GOWEN: Objected to, because it asks the witness to testify as to the contents of a written statement, the statement itself being the best evidence.

A. I do not know. I would naturally say the statement must have been prepared in such a way as to be satisfactory to the road, but how they were prepared I had nothing to do with, and I do not know just how they were prepared.

Q. In order to get repayment under those circumstances, must not the statement furnished by your company to the railroad company have contained the general information indicated by my previous question?

Objected to for the reasons before stated.

A. I do not know.

Q. I do not ask you whether it was or not. I ask you whether that information must have been contained in the statement presented by your company to the railroad company, in order that they might

know how much you claimed back, and whether you were entitled to it under the registered contract that was overlapping?

Objected to, because the witness is asked to state what in his opinion the railroad company would regard as sufficient evidence to justify its payment.

A. I do not know.

Q. In case you wanted to find out what was in your statements, to what person in the employ of your company would you go for information?

A. I would not expect to get that information now.

Q. I am not asking now. I am asking at the time you were getting these rebates.

A. At that time I would have gone to Mr. Myers. When payments came in he checked them up, O. K.'d them, handed them to me as treasurer, and I simply indorsed the checks.

Q. You know of your own personal knowledge as
103 treasurer, that as a result of applications made on these overlapping contracts, you did get rebates, and they passed through your hands as treasurer?

A. I received that money. I do not know whether you call it rebates or not.

Q. In what account in your bound books would these rebates, thus made, be entered? Would it not be in what is called "Coal Account"?

A. Yes, sir.

Q. What do you know as to 1900 and 1901, as to any arrangement practically existing between the coal-carrying roads carrying coal, from the Clearfield region, by which there was a territorial division of the business, a division of the business amongst the coal-carrying roads on any territorial or other basis arranged among themselves. Do you know anything about that?

A. I never knew of any such arrangement.

Q. Would not that account for the fact that whilst you could have sent coal by the Reading, you always sent all of your coal by the Pennsylvania Railroad?

A. No, sir.

Q. You do not think that would account for it?

A. No, sir.

Q. Your sales of coal, as a general thing, were made to the consignee at a price delivered to him. That was your course of business, was it not?

A. What do you call the consignee?

Q. The person you were selling it to, your customer?

A. We named a price to our customer, sometimes delivered on board of a vessel, sometimes delivered at destination.

Q. But, at all events, with your customer you always fixed a price at which coal would be delivered to that customer at a given point?

A. Yes, sir.

Q. I understood you to say that you almost invariably
104 prepaid the freight. That was your custom, was it not?

A. Yes, sir.

Q. During the whole of that period?

A. That is for coal by tidewater, that is to Greenwich Point.

Q. How about all-rail coal delivered in Pennsylvania?

A. We did both ways. Some customers we prepaid, some customers paid their own freight.

Q. When they paid their own freight, and you afterwards for any reason got a repayment from the railroad company, that repayment went to the Berwind-White Coal Mining Company?

A. I do not recollect ever getting a repayment.

Q. If you had, it would not have gone to the consignee?

A. I do not think we ever had any repayments during those years on coal delivered in Pennsylvania.

Q. You mean on all-rail coal?

A. Yes, sir.

Q. Then the repayments, you think, were almost altogether on shipments of coal to Greenwich Point?

A. I think that is so. I do not know. I cannot tell now.

ROBERT KELSO CASSATT, SWORN.

By Mr. NEWLIN:

Q. You are connected with the Keystone Coal and Coke Company?

A. Yes, sir.

Q. What is your position?

A. My title is Eastern Manager.

Q. Who is the president?

A. George H. Huff.

Q. Of Greensburg?

A. Greensburg, Pa.

105 Q. Is he the member of Congress from there?

A. Yes, sir.

Q. He was a member of the last House?

A. I do not know.

Q. Was he not a member of Congress up to the 4th of March?

A. Yes, sir.

Q. Who is the secretary?

A. Richard Coulter.

Q. The office is in the Arcade Building?

A. My office is.

Q. Where is his office—at Greensburg?

A. Yes, sir.

Q. Who is the treasurer?

A. Mr. L. B. Huff.

Q. He is a son of Colonel Huff?

A. Yes, sir.

Q. His office is also at Greensburg?

A. Yes, sir.

Q. The only office here is in the Arcade Building?

A. Yes, sir.

Q. That is a sales office?

A. Yes, sir.

Q. You are sales agent?

A. Yes, sir.

Q. How long has that company been in existence?

A. The Keystone Coal and Coke Company was incorporated in 1902.

Q. Were you connected with any company shipping coal at any time between 1894 and 1901?

A. I sold coal belonging to various companies.

Q. Will you name some of the companies?

A. The Greensburg Coal Company.

Q. Did not that company, or some of its property, come in afterwards to form the Keystone Coal and Coke Company?

A. The property of that company is now owned by the Keystone Coal and Coke Company.

Q. So that the company you now refer to, the Greensburg Coal Company, during that period from 1894 to 1901, operated in its own name what is now known as the Keystone Coal Company, by ownership of the same property. Is that so?

A. The Keystone Coal and Coke Company now owns the property of the Greensburg Coal Company, but I do not know what property the Greensburg Coal Company had prior to 1900.

Q. Whatever property they had when you were acting as sales agent of the Greensburg Coal Company during 1894 to 1901, or any part of that time—

A. I never acted as sales agent for the Greensburg Coal Company, or any other coal company. I bought and sold certain coal, irrespective of who the owners were.

Q. Were you conducting business as a company, or with a company, or by yourself on your own account?

A. There was no partnership or company that had any standing that I know of.

Q. Take the Greensburg Coal Company. During at least a part of that period from 1894 to 1901, you did buy coal from them, did you not?

A. Yes, sir.

Q. Some of that coal was delivered at Greenwich Point?

A. I think so. I cannot remember that far back.

Q. Were you the customer of the Greensburg Coal Company in those purchases? Were they selling to you as a customer, or did you represent others for whom you were buying from the Greensburg Coal Company?

A. We bought from the Greensburg Coal Company.

Q. By "we" you mean yourself individually?

A. Myself and others that were interested with me.

Q. Who were the others that were interested with you in buying coal from the Greensburg Coal Company?

A. Very much the same gentlemen that are now interested in the Keystone Coal Company.

Q. You are a son of Mr. A. J. Cassatt, are you not?

A. Yes, sir.

Q. Was he not interested in the purchase of coal from the Greensburg Coal Company?

A. No, sir.

Q. Is he not interested in the Keystone Coal and Coke Company?

A. No, sir.

Q. Whoever the people were, you did buy coal from the Greensburg Company, and bought it on contracts running for what period of time?

A. No, sir.

Q. Never?

A. No, sir.

Q. Did you never make contracts with the Greensburg Coal or any other company, or individual having coal to sell, which contracts overlapped the succeeding April 1st?

A. Do you mean, did we sell on such contracts, or buy?

Q. Did you either buy or contract with others to sell to them coal, under a contract which would expire later than the succeeding April 1st?

A. I think not.

Q. Did your contracts all expire on April 1st?

A. Our business here was very small. We had very few contracts at that time. I think we had no overlapping contracts.

Q. Then you cannot recall any contract made during 1901, or previous to that, which would overlap April 1st of the current year?

A. No, sir.

Q. On any of the purchases or sales that you have mentioned, which occurred at any time between April 1st, 1894, and
108 April 1st, 1898, and between July 1st, 1900, and March 18th, 1901, did you on your own account or for any one else present claims to the Pennsylvania Railroad Company for allowances on any account whatever, to be paid by the railroad company concerning those shipments, without regard to what was the ground of the allowance?

A. Yes, sir; we made claims.

Q. What was the basis of your claim?

A. We made very few of them. We only made claims where there was a clerical error or change of destination.

Q. Did you make any claims on overlapping contracts?

A. No, sir.

Q. Did you, without regard to any particular reason assigned, get back any money that had been paid for freights in the period mentioned?

A. Only where there was an error in the charge.

Q. You mean a clerical error?

A. Yes, sir.

Q. What would you call a clerical error?

A. A mistake in figuring the amount due.

Q. You never paid any more than the open rate, the published rate?

A. No, sir; except where there was a mistake made.

Q. Do you mean a mistake made in the published rate, or a mistake made in the tonnage? You would be charged the open rate

on a certain number of tons and you would pay it. Then you would make a claim to be paid back part of what you had paid, for what reason?

A. For the reason that we had been charged either more than the published rate or else for too much tonnage.

Q. Do you mean that you were in some cases charged on the correct tonnage a greater rate per ton than the published rate?

109 A. It occurred sometimes. They would charge the line rate instead of the tidewater rate, by mistake.

Q. Are you prepared to say that cases of that character were the only cases in which you got money back from the railroad?

A. Yes, sir.

Q. Were any of those contracts in existence on April 1st, 1900, when the increase was made from fifty-five cents to one dollar and ten cents to Greenwich Point?

A. We had no overlapping contracts at that time.

Q. You had no contracts that overlapped that particular period?

A. No, sir.

Q. Did you represent any people who had contracts that overlapped July 1st, 1900?

A. I have no knowledge of any such contracts.

Q. You remember the rate was fixed April 1st, 1900. Did you represent any customer whose contract was made prior to April 1st, 1900, and which continued in existence until after July 1st, 1900?

A. I do not know of any such contract.

Q. In those cases in which you did get money back for any reason, no matter what, what was the method pursued with the railroad company in getting the money back. How was it done?

A. We presented a bill.

Q. That bill would give the name of the customer?

A. I cannot say.

Q. At all events, it would state the amount of the tonnage, and state the charge that you had paid, and state how much you wanted back, would it not?

A. Yes, sir.

Q. The amount you wanted back would be based on so much per ton?

A. Not necessarily, if they charged us for more tonnage than we had shipped.

Q. Then you would state the tonnage, and state what was the excess tonnage you were charged with, and ask the balance back?

110 A. Yes, sir.

Q. In the same way, if there was no excess tonnage, but was an excess over the published rate, you asked that back, and specified that as the foundation of your claim, is that it?

A. We asked to have it adjusted on the basis of the published rate.

Q. Then do I understand you to say, as a net result, you never paid anything else than the published rate?

A. Yes, sir; that is correct.

A. M. WALKER, SWORN.

By Mr. NEWLIN:

Q. You are connected with the Morrisdale Coal Company, are you not?

A. Yes, sir.

Q. What is your position there?

A. Bookkeeper.

Q. Who are the officers of the company?

A. B. F. Clyde at the present time is president; F. H. Wigton, general manager; Edward J. Thiel, treasurer.

Q. Mr. Clyde owns the majority of the stock of the Morrisdale Coal Company, does he not?

A. Yes, sir.

Q. They have what is known as the Clyde Line?

A. Yes, sir.

Q. You have steamship coal contracts with them?

A. Yes, sir.

Q. You had such contracts at different times between April 1st, 1894, and April 1st, 1898, and between April 1st, 1900, and March 19th, 1901?

A. Yes, sir.

Q. How many years did those contracts run?

A. Always a year.

111 Q. Always at least a year?

A. At least a year.

Q. They were sometimes more than a year?

A. No; I do not think that we ever had any more than a year.

Q. You do not think they overlapped the 1st of April of the current year?

A. This year?

Q. Or any year?

A. Yes, sir.

Q. You did not make contracts to expire on the first of April?

A. Not all of them. Some of them did.

Q. There were instances in which the contract, no matter what its length of time, did expire in a period in the succeeding year that was after the 1st of April of that year?

A. Yes, sir.

Q. Had you any such contracts that expired after the 1st of July, 1900, or at any time in 1901?

A. I think we had.

Q. You recall, do you not, that on the 1st of April, 1900, the rate to Greenwich Point was increased?

A. Yes, sir.

Q. It was doubled from the previous year?

A. Yes, sir.

Q. That is within your knowledge?

A. Yes, sir.

Q. It is not a fact that in the case of contracts such as you have mentioned, that during 1900 and 1901 your company got the benefit

of the prior lower rate of fifty-five cents a ton, and did not pay the increased rate of one dollar and ten cents?

A. They paid the one dollar and ten cents.

Q. And got it back?

A. And got it back.

Q. They got fifty-five cents a ton back?

A. Yes, sir.

Q. You got it back in all these contracts with the Clyde Line?

112 A. No, sir.

Q. With whom were the contracts made?

A. It is a clear, straight contract at a certain price for the year, running from April to April.

Q. That was the way it was made in the case of the Clyde Company?

A. Yes, sir.

Q. Do I understand that other customers of the Morrisdale Coal Company, of which Mr. Clyde owned a majority of the stock, were better off than the Clyde Line in their contracts? Is that what you mean?

A. No; I do not know about that. I do not understand your question.

Q. You have just said that you would get back the difference between the increased rate that began in 1900 and the prior rate of 1889, which was one-half or fifty-five cents. That is true, is it not?

A. Yes, sir.

Q. You would get back, then, fifty-five cents?

A. Yes, sir.

Q. Had you not been in the habit prior to that of getting a rebate on the fifty-five cents of the lower rate of 1899?

A. I do not think so.

Q. For what persons, or for your own company, did you get back the money on shipments made between July 1st, 1900, and March 18, 1901, on this overlapping contract?

A. That I could not tell you.

Q. You know you got them anyhow?

A. I do not know.

Q. You have just said so?

A. Then I was mistaken. I did not understand your question.

Q. Then you do not think that you got any?

A. No; I do not think so.

Q. If you got any they would be entered in your books, would they not?

A. Yes, sir.

113 Q. Would they be entered as sundries coal or coal account, or what?

A. Coal adjustment.

Q. How did you go about getting money from the railroad company?

A. We presented a bill for it every month.

Q. What reason did you give for being paid back anything?

A. It was according to contracts that were filed with the railroad company. We would make claim for the difference, whatever it was.

Q. That was your habit during the period covered by my question?

A. Yes, sir; I think that is right.

Q. The railroad company required you in advance or as soon as the contracts were made, to report them to their freight agent, or whoever was in charge, did it not?

A. Yes, sir.

Q. That was you- custom?

A. At that time; yes, sir.

Q. Would you send copies of the contracts, or only report the name of the person with whom the contract was made?

A. We would send the contract over there.

Q. The original contract?

A. Yes, sir; and let the company register it.

Q. Then the company actually saw the contracts?

A. Yes, sir.

Q. And got such information as the contract would furnish?

A. Yes, sir.

Q. All those repayments to your company are contained in the books mentioned?

A. Yes, sir.

Q. Those are permanent books of your company?

A. Yes, sir.

Q. They have not been destroyed?

A. No, sir.

114 Q. You still have them?

A. Yes, sir.

Q. Were some of your shipments made from the Clearfield region?

A. All of them.

Q. Were all of your shipments made by the Pennsylvania Railroad?

A. To Greenwich; yes, sir.

Q. Could you have got coal there by any other road, by the Reading?

A. Not that I know of.

Q. You could have got it to Philadelphia?

A. Yes, sir.

Q. But not to Greenwich Pier?

A. No.

Q. That belonged to the Pennsylvania Railroad?

A. Yes, sir.

Q. Have you any rail shipments to Philadelphia for delivery within the State?

A. Yes, sir.

Q. Were they all made by the Pennsylvania Railroad?

A. Not all of them.

Q. Sometimes by the Reading?

A. Sometimes by the Reading, via Harrisburg.

Q. So that in case of all rail shipments from the Clearfield region to Philadelphia, it was feasible to make shipments either by the

Reading from Harrisburg or all the way by the Pennsylvania Railroad?

A. Yes, sir.

Q. And in point of fact, you did sometimes ship by the Pennsylvania Railroad to Harrisburg, and from Harrisburg to Philadelphia by the Reading?

A. Yes, sir.

Q. There was no practical difficulty about making such shipments, was there?

A. No, sir.

Q. How were the payments made back by the railroad company, in the shape of checks?

115 A. By check.

Q. You got these contracts back after the railroad had examined them?

A. Yes, sir; I think they were over there a week or so, and we got them back again.

Q. Some of those contracts did expire at a date later than the next April 1st?

A. Yes, sir.

Q. Did the railroad company ever object to your making such contracts expiring later than the succeeding April 1st?

A. That I could not answer.

Q. Not to your knowledge?

A. Not to my knowledge.

Q. If they had objected, in the natural course of business it would have come to your knowledge, would it not?

A. I do not think so.

Q. Who would have known it?

A. Frank H. Wigton, the general manager.

Q. What did you call these repayments, freight adjustments?

A. Freight adjustments, or freight drawbacks.

Q. In your books it is called freight drawbacks?

A. Yes, sir.

Cross-examination.

By Mr. GOWEN:

Q. Did you deliver these contracts to the railroad company?

A. No, sir; I think Mr. Frank H. Wigton delivered them.

Q. Do you think you are correct in saying that those contracts were delivered at the time they were made? Were they not delivered at the time the claim was made, that on account of the existence of those contracts for coal still to be shipped under them, a rebate should be allowed?

116 A. I think that is right. I do not think it was the time they were made. It was the time the change in the rate was made.

By Mr. NEWLIN:

Q. Anyhow, you paid the old rate, and not the new rate?

A. We paid the old rate and adjusted it.

Q. And got back the difference?

A. Yes, sir.

CHARLES A. BUSCH, sworn.

By Mr. NEWLIN:

Q. You are connected with the Columbia Coal Company?

A. Yes, sir.

Q. What is your position there?

A. Manager.

Q. Who is the president?

A. Mr. John Lloyd.

Q. Who is the secretary?

A. I do not think we have any secretary at this time.

Q. Who is the treasurer?

A. John Lloyd.

Q. He is president and treasurer, and you are general manager?

A. Yes, sir.

Q. Are you also sales agent? Do you make the sales and get the customers?

A. Yes, sir.

Q. You are familiar with all that relates to that?

A. Yes, sir.

Q. Were you so engaged between April 1st, 1894, and April 1st, 1898, and July 1st, 1900, and March 18th, 1901, or any part of that time?

A. No, sir.

117 Q. When was the Columbia Coal Company organized?

A. I do not know.

Q. When did you go into their employ?

A. I think it was February, 1901. Either January or February, 1901.

Q. So that you were employed only about two or three months during this period?

A. Whatever it may be.

Q. Before that time had you been in the same business for some one else?

A. No.

Q. You had not been in the coal business at all?

A. I had been in the coal business in operating, but not in the sales department.

Q. You had been operating in what part of the time I have mentioned?

A. Since 1898.

Q. From April 1st, 1894, to April 1st, 1898?

A. I think in the Spring of 1898 we started operating

Q. Then between April 1st, 1894, and April 1st, 1898, you were not operating at all?

A. No, sir.

Q. Were you representing any one who was operating?

A. No; I was representing myself in 1898.

Q. Between 1894 and 1898 were you in the coal business at all?

A. Not at all.

Q. That brings the time down to January, February, and eighteen days of March, 1901.

A. Yes, sir.

Q. During that period you were engaged for the Columbia Coal Company?

A. Yes, sir.

Q. During that period had the Columbia Coal Company, to your knowledge, any contracts that would extend or had extended from a period before until a period after April 1st, 1900? Had they any overlapping contracts at the time you were there?

A. Not to my knowledge for the sixty days or so included in 1901 when I was connected with them.

Q. Had they any contracts in existence while you were there in 1901, that is to say, from the 1st of January, to the 18th of March, 1901? Had they any contracts that would overlap the succeeding April 1st of 1901?

A. Not to my knowledge.

Q. During the time that you were with this company as general manager, did the company get back from the Pennsylvania Railroad Company any money on account of freight that had been theretofore charged and paid by your company?

A. Not to my knowledge.

Q. Who had charge of such matter, if there were such? Would it be Mr. Lloyd?

A. Yes, sir; it would be Mr. Lloyd, but I think I would have known about them.

Q. That is all you know?

A. Yes, sir.

JOHN LLOYD, sworn.

By Mr. NEWLIN:

Q. You are president of the Columbia Coal Company?

A. Yes, sir.

Q. How long have you been president?

A. Since its organization in 1892.

Q. Then your term of service covers the whole of the period from April 1st, 1894, to April 1st, 1898, and from July 1st, 1900, to March 18th, 1901?

A. Yes, sir.

Q. During that period were you shipping coal from the Clearfield region to Philadelphia?

119 A. No; our mines are not located on the Clearfield region.

Q. Where are they?

A. Cambria and Westmoreland Counties, along the main line.

Q. You were in Cambria County?

A. Yes, sir.

Q. Is not that part of what is called the Clearfield region?

A. It is known as District No. 2.

Q. From Cambria County the freight rate is the same as the whole of that region?

A. Yes, sir.

Q. That would include the counties of Bedford, Clearfield, Clinton, Cambria, and Indiana, would it not? They would have the same rate to Philadelphia?

A. I do not know that. I know that our rate is the same as the Clearfield rate, but I do not know the rate of Indiana and Clinton.

Q. Whatever was known in the trade and in the business of railroading as the Clearfield region, all had the same rate, and Cambria County, where you made shipments from, is in that?

A. In the Clearfield region.

Q. And paid the Clearfield rate, and some of your shipments were made to Greenwich Point, were they not?

A. Yes, sir.

Q. Were not some made all rail to Philadelphia, in addition to those made to Greenwich Point?

A. Yes, sir.

Q. The freight was usually prepaid by your company, was it not?

A. It was usually prepaid to tide.

Q. How about the rail shipments?

A. Not always prepaid. Sometimes coal was sold f. o. b. cars at the mines.

Q. But the bulk of your Philadelphia business was to Greenwich Point, was it not?

120 A. No; we were not very large shippers to tide.

Q. Was the tide more or less than the bulk of your shipments to Philadelphia or other points in Pennsylvania?

A. I think they were less.

Q. Less to Greenwich point?

A. Less than to Greenwich and to Amboy.

Q. Amboy is out of the State.

A. I want to correct that. Our shipments on the main line to Philadelphia would be greater than to Greenwich if you do not include Amboy.

Q. Take the all-rail shipments made to Philadelphia. All your shipments were by the Pennsylvania Railroad, were they not?

A. We sometimes shipped by the Pennsylvania Railroad to Harrisburg, and then by the Philadelphia and Reading.

Q. To Philadelphia?

A. Yes, sir. It all depended upon the siding of the consignee.

Q. At all events, it was a practicable thing, if you wanted to do it, to ship to Harrisburg by the Pennsylvania Railroad and the rest of the way by the Reading?

A. We could do that.

Q. There were no physical difficulties, no want of connection?

A. Not a thing, if the consignee had a siding on the Reading.

Q. During this period of time you had charge of the finances of your company, had you not?

A. No; I did not.

Q. You were treasurer, were you not?

A. No; I was not treasurer.

Q. Who was treasurer during that time?

A. Up until 1902 W. H. Goodwin was treasurer.

Q. During the whole of that time?

A. From the organization of the company.

Q. He is dead?

A. Yes, sir.

121 Q. Who was his principal assistant during that period?

A. He did not have any assistant. The business was conducted by our manager.

Q. Who was your manager during that period?

A. Robert Mitchell.

Q. Where does he live?

A. He lives in Philadelphia—in Germantown. He is connected with the Pennsylvania Coal and Coke Company.

Q. During the period that you were president, did your company get back from the Pennsylvania Railroad Company, any ground, I do not care what the ground was, any money on account of freight that had theretofore been paid to the railroad company?

A. They did.

Q. Were not those repayments made on statements or memoranda furnished to the railroad company setting forth the tonnage, the period of time, car numbers, and things of that kind, and a lump sum asked to be repaid?

A. Those statements were made by our manager, and they would cite the tonnage and the time, and they would ask for an allowance or a rebate for an overcharge.

Q. The statements furnished to the railroad company were sufficiently in detail to enable the railroad company to verify them from their own books, to see if they were correctly given?

A. I presume they were.

Q. That was the object, so they could check them off and see that they were right?

A. Those statements were made for the purpose of recovering the overcharge or rebate.

Q. What was the cause assigned by you for desiring a repayment?

Objected to by Mr. Gowen, the witness having answered that the statements contained the reasons.

122 Q. Did you spread on the face of the statements why you made the claim?

A. I do not think so.

Q. So that the statement contained enough information to acquaint the railroad company how much you wanted back and on what tonnage, but you did not give any reason. Now, I want to know what the reason was. Why should you get back any money you had once paid to the railroad for freight?

A. In some cases there were overcharges in the rate, and in some cases we claimed a rebate or allowance.

Q. In other words, you claimed that other people were getting some money back, and you wanted to be treated the same?

A. We believed they did.

Q. You thought you ought to be treated the same? That is about it, is it not? That is the way you put it to the railroad?

A. No; we did not put it that way.

Q. You made it as pleasant as possible, but that was the real thing, that you wanted to be put on a par with other people who were getting money back, and you understood that was more or less general?

A. We understood there was an allowance and adjustment made.

Q. So that in that way part of the freight that had been collected was paid back, and you wanted to get it back, too. That was it, was it not?

A. Yes, sir.

Q. During the period I have mentioned did your company have any overlapping contracts; that is to say, contracts that would not expire at the succeeding April 1st of the then current year?

A. Not to my recollection. Our contracts were generally made from April 1st to April 1st, when there were any contracts.

Q. Did you not have a very considerable trade that consisted of people who, without any special contract, understood that they could have coal for a certain period at a certain price, and that it did not matter whether it overlapped April 1st of the current year or not?

A. Yes, sir; we had trade of that kind, where we sold from month to month, and just kept up the supply without a contract, just upon a statement of a given price.

Q. You would keep that price up after the first of April, without regard to the fact that in the interval of time there was a change in the freight rate, either lowering it or increasing it?

A. I cannot answer that, because the sales were made by the general manager, but I rather think if there was any reduction in the freight rate the consignee would very quickly advise us and want the benefit of it.

Q. You do not know whether he got it or not? Did not you prepay the freight yourself?

A. Not always. In some cases we did.

Q. Do you not know without going into particulars that there were instances during the time I have mentioned which you did get back money from the railroad company which made the net rate to you less than the published rate?

A. No; I do not know that, because I cannot recall about the contracts except just in a general way. That is, they were from year to year.

Q. You have just said you had a sort of running contract with regular customers that were irrespective of the 1st of April?

A. Yes, sir; they were not contracts; just simply prices given.

Q. It was an understanding?

A. Yes, sir.

Q. They understood they could get coal from you?

A. Without written contracts, on our statement. We had such arrangements.

Q. You had understandings, or courses of business, that were established between your company and some of your customers, by which they had reason to believe that they could rely upon your company furnishing them coal continuously for a given price, which would carry it, in fact, beyond the succeeding 1st of April?

A. Yes, sir; but it would be very likely qualified, subject to any change in rate.

Q. You do not know whether that was done or not?

A. I cannot say positively. That is my belief.

Q. There was, at all events, such a course of business between you in relation to such shipments, that you did not consider that the 1st of April would make any difference?

A. It would make a difference if there was a change in the rate, because it is very likely they were qualified in that way.

Q. I am speaking of those cases where there was no written contract.

A. That is what I am referring to now. We would make a quotation for delivering coal for a year or six months, subject to change in rates, either one way or the other.

Q. Take, for instance, the case where the increase was made over 1899, where the rate was raised from fifty-five cents to one dollar and ten cents. Did your company at any time between July, 1900, and March 18th, 1901, get any money back in the shape of rebate or allowance, or whatever it was called, so as to reduce the net rate below the open rate of one dollar — ten cents fixed for 1900 and 1901?

A. I cannot tell you that; I do not know.

Q. Would not that come within your knowledge?

A. No.

Q. That was all done by Mr. Mitchell?

A. Robert Mitchell. I am not a resident of Philadelphia; I live in Altoona. I am not at the office, only some portion of the Winter months. I would not be familiar with all those details.

Adjourned until April 13th, 1905, at 3.30 p. m.

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PHILADELPHIA, April 13th, 1905—3.30 p. m.

Present:

J. W. M. Newlin, Esq., for plaintiff.

F. I. Gowen, Esq., and E. J. Sellers, Esq., for defendant.

EDWARD J. STRAIN, SWORN.

By Mr. NEWLIN:

Q. You are secretary of the Punxsutawney Coal and Coke Company?

A. Yes, sir.

Q. How long have you been secretary?

A. I do not exactly remember.

Q. About?

A. I was made secretary either in 1890 or 1892. I do not know which year.

Q. Have you been secretary ever since?

A. Yes, sir.

Q. Where is your place of business?

A. Room 305 Betz Building.

Q. Who is president?

A. Edward J. Berwind.

By Mr. GOWAN:

Q. Do you reside in Philadelphia?

A. No; my residence is Wilmington.

By Mr. NEWLIN:

Q. Who is the treasurer?

A. Frederick McOwen.

Q. Your company is not engaged in the shipping of coal, is it?

A. No; it is not an operating company at all.

Q. Does it own coal properties that are operated by others?

A. It does, but the coal is now exhausted under their property and all its possessions now consist of some surface and some
126 tenement houses. The coal has all been mined from under the property.

Q. Between April 1st, 1894, and April 1st, 1898, and between July 1st, 1900, and March 18th, 1901, during any of that time was your company mining coal?

A. It never mined coal.

Q. Had it lessees who were mining coal?

A. Yes, sir.

Q. Was the Berwind-White Coal Mining Company a lessee?

A. Yes, sir.

Q. During how much of that time that you have mentioned was the Berwind-White Coal Mining Company operating the property of the Punxsutawney Coal and Coke Company from 1894 to April 1st, 1898?

A. The Berwind-White Coal Mining Company operated the property until it was exhausted.

Q. Was it operating it as far back as April 1st, 1894?

A. Yes, sir; I think so.

Q. Did it continue to operate it as late as April 1st, 1898?

A. It had not been exhausted at that time. They continued operating during that period.

Q. About when, as near as you remember, was it that the property was exhausted?

A. I should say two years back.

Q. So that they were also operating it between July 1st, 1900, and March 18th, 1901?

A. Yes, sir; I should say so.

Q. Were any of these properties that were being operated by the

Berwind-White Coal Mining Company situated in what is known as the Clearfield Region in Pennsylvania?

A. No, sir.

Q. What part of Pennsylvania were they in?

A. They were in Jefferson County.

Q. What is that called in railroad parlance?

A. The Punxsutawney District.

127 Q. Do you know anything about freight rates between that point and Philadelphia?

A. I have not the slightest idea.

Adjourned until April 18th, 1905, at 3.30 P. M.

APRIL 18TH, 1905—3.30 p. m.,

Present: Mr. Newlin, Mr. Gowen and Mr. Sellers, of counsel.

J. CHESTER WILSON, sworn.

By Mr. NEWLIN:

Q. You were once a stockholder in the Alexandria Coal Company?

A. Yes, sir.

Q. Did you ever see the list of stockholders?

A. Yes, sir.

Q. Did you see any names on it that were familiar to you in connection with the transportation of coal?

Objected to by Mr. Gowen, as the stock list is evidence.

A. Yes, sir.

Q. Do you recall any names. If so, state them?

A. Not very distinctly, except probably J. G. Cassatt and William A. Patton.

Q. Were there any others connected with the Pennsylvania Railroad?

A. Yes, sir; but I do not recall the names now particularly.

Cross-examination.

By Mr. GOWEN:

Q. Who were the stockholders?

A. I do not know.

Q. Where did you see this list?

128 A. In the office of the Alexandria Coal Company.

Q. Where was that?

A. In Philadelphia.

Q. Where was the office in Philadelphia?

A. I think at the time it was in Third street.

Q. Can you not give us the number?

A. No.

Q. What year was it?

A. It is a number of years ago. I cannot recall the exact year. It must have been 1890.

By Mr. NEWLIN:

Q. How did you come to go there?

A. In connection with the sale of shares.

Q. Who requested you to go, and whom did you sell the stock to?

A. I sold the stock to Mr. Frederick McOwen.

Q. Did he make a statement to you as to the then condition of the company and its prospect?

Mr. Gowen objects to any conversation between the witness and Mr. McOwen. Question withdrawn.

ROBERT MITCHELL, sworn.

By Mr. NEWLIN:

Q. What is your business?

A. General sales agent of the Pennsylvania Coal and Coke Company.

Q. Between April 1st, 1894, and April 1st, 1898, and between July 1st, 1900, and March 18th, 1901, what business were you in?

A. Coal business.

Q. During the earlier period from April 1st, 1894, to 1898, with what company were you associated?

A. The Columbia Coal Mining Company.

Q. What was your position?

A. Manager.

129 Q. Who were the secretary and treasurer respectively during that time?

A. I was secretary and Mr. Howard Goodman was treasurer.

Q. Was not Mr. Cassatt after his death?

A. I was not with them after his death.

Q. Were you connected with any other company in that time?

A. No, sir.

Q. In the later period, between July 1st, 1900, and March 15th, 1901, what company were you with?

A. The Webster Coal and Coke Company.

Q. Had you before that been with James L. Mitchell or James L. Mitchell & Co.?

A. No, sir.

Q. During how much of that time were you with the Webster Company?

A. We started in business in December, 1899, and I was with them until they were merged into the Pennsylvania Coal and Coke Company.

Q. About when was that?

A. About a year and a half or two years ago, I do not just recall.

Q. Then during the whole of that time specified after the time you were with the Columbia you were with the Webster?

A. Yes, sir.

Q. That covers the two periods?

A. Yes, sir.

Q. After you went with the Webster, did you still have any official relation with the Columbia?

A. No, sir.

Q. During those periods who were secretary and treasurer of the Webster?

A. Mr. Robert M. Law is the treasurer, and Albert Edwards is the secretary.

Q. Both of those were operating companies, were they not?

A. Yes, sir.

130 Q. During that period of time, did both of them make shipments from the Clearfield Region to Philadelphia?

A. Yes, sir.

Q. Were you general manager of both?

A. General sales agent.

Q. You made the sales and made the contracts with the customers?

A. I did.

Q. Had you anything to do, or have you any knowledge of whether the freight was usually prepaid by these two companies?

A. I think part of the time the freight was prepaid.

Q. Was it not always prepaid when you sent it to Greenwich Point?

A. No; it was not always prepaid. I cannot recall when they started to make it prepaid.

Q. How about all-rail to Philadelphia?

A. We never prepaid that. It is only of late years we prepaid at tidewater.

Q. At that time were you bringing any of this coal in addition to what you brought to Philadelphia by the Pennsylvania Railroad?

A. We brought it all by the Pennsylvania.

Q. You sent none by the Reading?

A. No.

Q. Was there any difficulty in your sending by the Reading if you wanted to?

A. We could not send it to the piers.

Q. But you could reach Philadelphia by the Reading road if you wanted to?

A. Yes, sir; we did reach Philadelphia on certain deliveries by the Reading road, by way of Harrisburg.

Q. So that there was no physical difficulty in the way?

A. No.

Q. You know, do you not, that from time to time after paying freight to the Pennsylvania Railroad, for some reason or
131 other moneys were repaid by the Pennsylvania Railroad Company during this period of time from 1894 to 1898, and from 1900 to 1901?

A. In 1900 and 1901 I do not think there were.

Q. From 1894 to 1898?

A. Yes, sir.

Q. Those repayments were on freight account?

A. Yes, sir.

Q. Taking these two companies, the Columbia and the Webster, what sort of statements were prepared for the railroad company as a

basis of repayment? What was the nature of the statements you prepared, written statements?

A. We prepared statements showing car numbers and weights.

Q. And the point of beginning and ending of the shipment?

A. Yes, sir.

Q. And the tonnage, and I suppose it also stated what you had paid, the amount of the freight, and that was carried out, was it not?

A. It is so long ago I do not remember just exactly the form of the statement.

Q. But these statements thus given to the railroad company, contained a memorandum as to how much you expected back, what you were claiming to have repaid?

A. Yes, sir.

Q. It was based on so much per ton, was it not?

A. Yes, sir.

Q. What was the ground or theory upon which, having paid money to the Pennsylvania Railroad Company for freight, you expected to get any of it back?

By Mr. GOWEN:

Q. Did you prepare the statements yourself?

A. They were prepared by a bookkeeper under my direction. The ground was that we had paid more freight than we ought, and we wanted some of it back.

132 By Mr. NEWLIN:

Q. Do you mean you had paid more than the open rate or published rate?

A. Yes, sir; at times.

Q. And at other times you had not paid more than the open rate?

A. No; we had not paid more than the published rate. We always paid that, but the published rate at times was more than the actual rate. There were times when they had a published rate, but everybody got something under that.

Q. Understanding that was the custom, you would make these applications to get a return of part of that freight, so as to bring it below the published rate. That is it, is it not?

A. Yes, sir; the published rates were rates for shipment in the harbor. Rates for shipment outside the capes were different. We paid the same rate on all coal to tidewater, and when we came to adjust it we actually paid a different rate.

Q. What was to prevent your adjusting that in advance before you paid it?

A. When we sent coal to the pier we did not know whether it would be shipped in the harbor or go outside the capes when we sold it.

Q. But you knew that the persons to whom you were selling it, you were simply carrying it for on that shipment as far as the pier? That is all you contracted to do?

A. When we sent it to the pier we did not know what shipment it would go on.

Q. The contract with your customers was to deliver it at the pier, was it not, and you shipped it in that way?

A. Sometimes it was to be delivered at the pier and sometimes to be delivered alongside their wharf.

Q. Was it not your custom to send it to be delivered at the pier?

133 I am speaking of these particular shipments, pier shipments?
A. No; our contract might have been to deliver alongside a wharf at Boston or Portland.

Q. But that was always specified in advance, was it not?

A. To the railroad?

Q. No; specified to yourself. You knew, when you were filling an order for a customer, before the coal was moved from the Clearfield region, by your relations with that customer, where it was going?

A. No. We knew it was going to the pier, but when it go to the pier we did not know whom it was going to. We have coal running there all the time. We could not tell when that coal was shipped what customer it would go to. We may not have had a customer at all at the time we shipped it, and may have sold it after it got there.

Q. When you sent coal from the Clearfield region to Greenwich Point, you often did not know whether it was going further or not, or whether you would get a customer for it?

A. That is right.

Q. Up to that time it was simply a shipment to the pier?

A. Yes, sir.

Q. Then you paid the open rate or published rate? Then some time afterward it was shipped by some subsequent agreement or arrangement to points out of the State?

A. Yes, sir.

Q. At other times it was not shipped outside of the State?

A. Yes, sir.

Q. When you made application for a rebate or repayment of part of the freight, did you specify all those things, or specify anything?

A. Yes, sir; we specified where the coal went and how much we wanted back. That is my recollection.

134 Q. Did you ever have any conversation with any one connected with the freight department of the Pennsylvania Railroad Company, as to how much you should get back and why you should get it back?

A. I think we did.

Q. With whom would you usually have those conversations?

A. Mr. Joyce, I think.

Q. Did you sometimes also with Mr. Searles?

A. Yes, sir.

Q. Would they sometimes object to the amount you asked to have paid back, and say it was too much?

A. Yes, sir.

Q. They generally did, did they not?

A. Yes, sir.

Q. What ground did they give for objecting?

A. I do not know as they gave any ground. They simply said it was too much; more than other people got, something of that kind.

Q. Would they specify what any of the other people were getting back?

A. No; I do not think they would.

Q. Sometimes you got all you asked, and sometimes you did not?

A. I do not think, as a rule, we got all we asked.

Q. You asked for enough to cover it?

A. We asked what we thought we ought to have. We did not always get it.

Q. What you asked was the result, was it not, of such information as you got in the business, from your familiarity with it, as to what you were led to suppose others were getting?

A. Yes, sir.

Q. You kept abreast of the best man, as far as you knew?

A. We tried to.

Q. In what way were the payments made?

A. By check.

Q. To what account were the payments credited in your book?

135 A. I cannot tell you that. I suppose they were credited to "Coal Account."

Q. Were those payments finally entered in your permanent books, your bound books?

A. I cannot say that, it is so long ago, and I have not had access to the books since I left. They were turned over to the treasurer.

Q. The persons who made entries in those books so far as concerned these repayments, looked to you, did they not, for information as to what they should put into the books as the credits?

A. I do not remember whether it was credited on the sales books or the treasurer's books. I cannot tell you that.

Q. It was credited on one or the other?

A. Yes, sir.

Q. They were permanent books?

A. Yes, sir.

Q. When you left these two companies those books were still in existence, as far as you know?

A. As far as I know.

Q. Did either or both of your companies during that period have what are called overlapping contracts—that is to say, contracts that called for delivery of coal for a period later than the following April 1st?

A. I think not.

Q. Was any of your business steamship coal?

A. No.

Q. You had none of that?

A. No, sir.

Q. Did you have written contracts usually?

A. Yes, sir.

Q. Did they specify that no deliveries were to be made under that

contract or those contracts after the ensuing April 1st, or were they just open?

A. That would depend entirely on the contract. There were some of one kind and some of another.

136 Q. Were there not some that were open, in which it was understood shipments would continue at the rate agreed upon, although they would run over the following April 1st?

A. No; I think our contracts all expired April 1st. We always tried to have them do that.

Q. Had you not some open running contracts, as to which there was an understanding that the customer could have coal at the rate then fixed, although it would run beyond April 1st?

A. I think not.

Q. Those contracts that were in writing, were they entered, or a synopsis of the terms entered, in any permanent book, or were they kept separately, each distinct contract, like any other documents?

A. They were often nothing more than an exchange of letters, or were drawn out in the form of a contract and signed. They were not entered in any book.

Q. Who got these repayments, your two companies or your customers to whom you sold the coal?

A. The payments were made to the companies, but the customers got an indirect benefit from that, because in making our price we based it on the freight rate that we finally paid.

Q. Then you mean to say if you sold coal at a given date and paid the open rate, that in making your arrangement with your customer you took into consideration the fact that you were going to get back a customary amount, whatever it was with you?

A. Yes, sir.

Q. You had that in mind in fixing the rate at which you sold to your customer?

A. Yes, sir.

Q. Do you recall now any overlapping contracts that were in writing?

A. I do not. I do not know as we had any.

Q. At the time you made any of these readjustments and got repayments from the railroad, were you asked as to whether you had any contracts running over the following April 1st?

137 A. No; I think we were told not to take them.

Q. Take the case of the increase in the rate in 1900 from fifty-five cents to one dollar and ten cents. You remember that, I suppose?

A. Yes, sir.

Q. Were there any shipments on which you got back the difference between the fifty-five cents and one dollar and ten cents?

A. No, sir.

Q. You never got any of that back?

A. We did not.

Q. These two companies of yours have suits now pending against the Pennsylvania Railroad, have they not?

A. Not for rebates on freight.

Q. Have both companies suits, the Webster and the Pennsylvania Coal and Coke Company?

A. Yes, sir. They are practically one company.

Q. Mr. Lloyd was examined in this matter, and in reference to the Columbia Coal Company he referred to you as knowing more about the matter than he did, and speaking of getting back money and of statements prepared for the railroad, he said this: "Q. That was the object, so that they could check off and see that they were right? A. Those statements were made for the purpose of recovering the overcharge or rebate." Explain what is meant by an overcharge or a rebate?

A. Just what you explained in your question. We paid more freight than we were entitled to pay, and we got back the difference.

Q. Were there not sometimes mere clerical errors?

A. Yes, sir.

Q. But the principal thing was not clerical errors, but to get a reduction on the published rate. That is true, is it not?

A. Yes, sir. There were times though when, as I say, one rate was published and it was understood that everybody got a
138 lower rate. That fifty-five cent rate you spoke of I do not think was ever published, yet I guess everybody had it.

Q. Do you understand that the rate raised on the first of April, 1900, from fifty-five cents to one dollar and ten cents the previous rate, was not a published rate?

A. I do not think it was. I am not sure the one dollar and ten cents was a published rate.

Q. Did you ever see either of them?

A. I think the published rate when we paid fifty-five cents was probably one dollar or one dollar and twenty-five cents, I do not remember. I know it was very much higher than fifty-five cents.

Q. You mean when it was actually paid at fifty-five cents it was as much as one dollar and twenty-five cents?

A. The published rate was a good deal more than fifty-five cents. I do not think anybody attempted to pay the published rate.

Q. You do not think they did at any time between April 1st, 1894, and April 1st, 1898? It was the common thing not to pay the published rate?

A. Yes, sir; I mean the fifty-five cent rate.

Q. That was for the year 1899?

A. I do not remember the year.

Q. Take 1900, when it was raised to one dollar and ten cents and continued during 1901. Did you pay the one dollar and ten cents?

A. I could not tell you that.

Q. That could be readily told from the books of these two companies, could it not?

A. Yes sir; I think it could.

Q. You have stated your impression as to everybody paying below the published rate at a previous time to the rate being doubled?

A. I think about 1900 rates were made straight, and everybody paid them as far as I know, and has ever since. I think it was about 1900.

139 Q. Have you got anything for any company that you were concerned with for 1900 or 1901? Have you got anything off of the one dollar and ten cents that you know of?

A. I think not.

Q. I will read you another statement from the testimony of Mr. Lloyd, the president of the Columbia. "Q. Did you not have a very considerable trade that consisted of people who, without any special contract, understood that they could have coal for a certain period at a certain price, and that it did not matter whether it overlapped April 1st, of the current year or not? A. Yes, sir; we had a trade of that kind, where we sold from month to month, and just kept up the supply without a contract, just upon a statement of a given price. Q. You would keep that price up after the 1st of April, without regard to the fact that in the interval of time there was a change in the freight rate, either lowering or increasing it? A. I cannot answer that because the sales were made by the general manager, but rather think if there was any reduction in the freight rate the consignee would ever quickly advise us, and want the benefit of it." What have you to say to that?

A. I think that is correct.

Q. Then he says, on page 55: "Q. You have just said that you had a sort of running contracts with regular customers that were irrespective of the 1st of April? A. Yes, sir; they were not contracts, just simply prices given. Q. It was an understanding? A. Yes, sir. Q. They understood they could get the coal from you. A. Without written contracts, on our statement. We had such arrangements." Is that correct, according to your recollection?

A. That is correct, but I do not think those orders had anything to do with the freight rate. I think they were usually sold at the mine. We did not take any chances on freight rates that we did not know.

Q. You knew from your customary dealing you would get
140 back something, and you knew about what it would be?

A. If we had a running order, and had no contract, we were not going to lose anything on freight. We would advance the price on that man as soon as we had to pay more freight.

Q. Were you not under a contract or understanding with him to deliver coal at a fixed rate, which rate was fixed prior to April 1st, of the current year?

A. Probably we were up as far as the 1st of April, but we did not as a rule run any contracts beyond that.

Q. But you did have some, did you not?

A. Mr. Lloyd said they were not contracts, they were running orders. I think those were running orders with coal sold at the mine, prices at the mine, without regard to freight rates.

Q. That is simply your general recollection now?

A. Yes.

Q. Your books would show whether that is the case or not?

A. I think so.

JOHN LLOYD, recalled.

By Mr. NEWLIN:

Q. What is your connection with the Alexandria Coal Company?

A. I am treasurer and clerk of the Alexandria Coal Company.

Q. Who is the president?

A. J. G. Cassatt.

Q. Has it any permanent secretary?

A. No; the office is filled by the title of clerk.

Q. So that that occupies the said relation as secretary?

A. Yes.

Q. Is it called clerk under the charter?

A. Yes; under the charter.

141 Q. Were you an officer between April 1st, 1894, and April 1st, 1898, and July 1st, 1900, and March 18th, 1901?

A. I think I was elected treasurer and clerk in 1896 or 1897.

Q. And kept right along?

A. No; I have been treasurer right along, but I have not always filled the position of clerk.

Q. During how much of that time has Mr. J. G. Cassatt been the president?

A. Mr. Cassatt has been the president since 1900.

Q. During that period of time you have had custody of the list of stockholders?

A. Yes.

Q. I want to know, during any of that period of time, whether any officer, director or employee of the Pennsylvania Railroad Company was a stockholder in the Alexandria Coal Company.

Mr. GOWEN: As the question as to who are the stockholders of the company has nothing to do with the question as to whether rebates were paid to it, I object to the question, and should be glad if the witness would decline to answer.

Mr. NEWLIN: Mr. Newlin says that this question is asked in connection with the following averment in the first count, viz., "This plaintiff is advised by counsel that in these circumstances it is not obliged to assume the incredible belief that no official of the Pennsylvania Railroad Company was directly or indirectly interested in the rebates granted to the Berwind-White Coal Mining Co., and that it is reasonable to believe that some person or persons, powerful in the management of the Pennsylvania Railroad Company, were individually interested directly or indirectly, in getting, through the Berwind-White Coal Mining Company, some personal pecuniary advantage, as a stockholder or otherwise, in the rebates

142 granted to that company," and in addition to that it is proposed to show such a connection between the Alexandria Coal Company and the Berwind-White Coal Company as would justify this examination, and further it is proposed to show as to the Alexandria Coal Company as a separate company, an operating company, that the advantage of the rebates did indirectly benefit persons connected with the carrying company, the Pennsylvania Railroad Company.

Mr. GOWEN: Mr. Lloyd, I have no right to control your action as

a witness. I only suggest, inasmuch as this has nothing to do with the question we are considering, that personally I would be glad if you would decline to answer the question until your counsel advises you whether you are obliged to do so.

The WITNESS: I would like to be excused from answering that question until I confer with my personal attorney.

Mr. NEWLIN: I am quite willing to do that, if you will come at the next meeting and in the meanwhile confer with him. I think that is a reasonable request.

The WITNESS: I would like to ask his advice about that.

Mr. NEWLIN: You will come at the next meeting, on next Tuesday at half-past three?

The WITNESS: Yes; I will do that.

Q. The Alexandria Company was an operating company, was it not?

A. Yes, sir.

Q. There was stock ownership in various interests, but it was not leased?

A. No, sir.

Q. The operations of the company were in its own name?

143 A. Yes, sir.

Q. Did you make any shipments during the period mentioned, from April 1st, 1894, to April 1st, 1898, and from July 1st, 1900, to March 18th, 1901, from the Clearfield region to Philadelphia, either all rail or to any point?

A. That would only take me back to about 1897. I have not any direct knowledge.

Q. Say 1897 and 1898. You would have some general knowledge?

A. Yes, sir; just in a general way. We shipped coal in the name of the Columbia Coal Mining Company to Greenwich.

Q. Did you not also ship coal as the Alexandria Company?

A. No; those shipments were made by the Columbia on the Columbia's account. They came from the Alexandria mines.

Q. So that during 1897 and 1898, whilst the Alexandria Coal Company was actually operating, the shipments during that period of time were made in the name of and through the Columbia Coal Company?

A. Some of the shipments.

Q. On those shipments did the Alexandria Coal Company get back from the Pennsylvania Coal Company in any way any money that had been paid for freight?

A. The Alexandria Coal Company did not get back any rebate or any allowance on any shipments that were made by the Columbia.

Q. Then whatever was done was done through the Columbia?

A. Through the Columbia.

Q. Take the case of shipments of coal actually mined by the Alexandria Coal Company and shipped from Clearfield to Philadelphia through the Columbia, and the Columbia getting the rebate, how would the Alexandria Coal Company get the benefit of that rebate as applied to its own shipments?

144 A. It did not get any benefit from it. The Columbia accounted to the Alexandria for the coal that they took at certain prices.

Q. That is to say, the Columbia would take the entire output of the Alexandria Coal Company at a fixed price from time to time?

A. No, it did not do that.

Q. State in your own way how it was done?

A. We made some small shipments to tide in the name of the Columbia, and the Columbia would pay the Alexandria a certain price for those shipments. Our business was principally railroad coal.

Q. Explain what you mean by railroad coal?

A. Supply coal.

Q. For the railroad company?

A. For the railroad company.

Q. And the coal thus supplied to the railroad company was the coal mined by the Alexandria Coal Company, but shipped through the Columbia Coal Company?

A. Yes, sir.

Q. The payment for the Alexandria coal was made by Columbia, which took it at a fixed price?

A. Yes, sir.

Q. Was that a written contract?

A. No.

Q. A running contract?

A. A running contract.

Q. It covered all that period you mention in 1897 and 1898, that you had knowledge of?

A. Yes, sir; 1897 and 1898.

Q. Did it cover 1900 and 1901?

A. Yes, sir.

Q. So that, as far as you know, during all that period of time there was such a running contract, by which the output of the Alexandria was taken by the Columbia and purchased by the Pennsylvania Railroad. Is that it?

A. No, not the output. They only took part of the output. 145 The Berwind took a very large amount of it.

Q. Is it not a fact that practically the whole, or nearly the whole, of the output of the Alexandria was either taken as railroad supply coal through the Columbia Coal Company for the Pennsylvania Railroad Company, or was taken by the Berwind-White Company?

A. It was divided between the two.

Q. You had not much outside business?

A. Not a great deal.

Q. Was the contract with the Berwind-White Coal Mining Company a written contract?

A. No; there was not any contract. It was simply an understanding that they would get a certain per cent. of the output from time to time, and they could take it.

Q. I mean about the rate paid for the coal. Was that fixed in writing, or was it an understanding?

A. Not in writing. It was an understanding.

Q. The understanding was made between yourself and Mr. McOwen, or one of the Berwinds?

A. One of the Berwinds.

Q. You fixed the price with the Berwind-White Company in conjunction with Mr. Harry Berwind?

A. Yes, sir.

Q. I want to know whether any time limit was fixed on that, whether the price ran over the succeeding April 1st.

A. No.

Mr. Gowen: I object to this testimony, and would be glad if you will refuse to answer this and let the Court decide whether this testimony has any relevancy.

The WITNESS: There is not anything in it. We simply sold coal to the Berwind from month to month, and the price would vary according to the cost of mining. That is the scale it was fixed on.

146 Q. Had not freight rates anything to do with it?

A. Not a particle.

Q. Then based on a variation that was fixed by the cost of mining, you had running contracts or understandings with the Berwind-White Coal Company for the delivery of coal at a fixed price, which would only vary according to the variation in the cost of mining?

A. That was the idea. They were not running contracts, because their orders varied a great deal. Some months they would take quite a lot of coal; other months very little.

Q. They were running in the sense that they, were continuous as to price, unless it was changed?

A. According to cost. The cost was a sliding scale.

Q. There was no arrangement as to a change to occur by reason of any change in the freight rates?

A. No; it was based upon the cost of production of coal.

Q. What you have testified as to the Columbia at a former meeting, about getting money back, also covers whatever Alexandria coal there was?

A. Yes, sir; that would be included in the statement.

FRANK H. WIGTON, SWORN.

By Mr. NEWLIN:

Q. You are connected with the Morrisdale Coal Company?

A. I am.

Q. What is your position there?

A. General manager.

Q. And has been for what length of time?

A. Since the inception of the company in 1895.

Q. Until now?

A. Yes, sir.

Q. Mr. A. M. Walker is one of your employes, is he not?

147 A. Yes, sir.

Q. During this period from April 1st, 1894, to April 1st, 1898, and from July 1st, 1900, to March 18th, 1901, was the

Morrisdale Coal Company engaged in shipping coal from the Clearfield region to Philadelphia, either all rail or to Greenwich Point?

A. Not in 1894.

Q. During 1895, 1896, 1897 and 1898 were they engaged in such shipment?

A. It was.

Q. And in 1900 and 1901?

A. Yes, sir.

Q. Did you get anything back on freight that had been paid? Mr. Walker has testified you did. What is your recollection of that?

A. The conditions varied during that period of time. The Pennsylvania Railroad Company used to charge a rate of freight to Greenwich which was called a schedule rate, and after the coal was reshipped from Greenwich Piers there was an adjustment or rebate—the terms were used synonymously—depending upon where the coal was consigned. There was one rate of freight in existence for the harbor of Philadelphia, and another rate of freight when it went outside of the capes, and these accounts were made up monthly from the shipments, put before the railroad company, and adjusted at the proper time.

Q. In those statements you requested to be repaid on the basis of so much per ton, whatever it might be?

A. All of which was well established and agreed upon.

Q. Who made the agreement on behalf of the railroad company?

A. The proper officers of the Pennsylvania Railroad. Mr. Joyce at one time, and Mr. Searles.

Q. What was the object of paying to the railroad company a greater sum than you were to be charged eventually?

148 A. That was a custom that had been in existence for very many years. There was a time during that period when I think no freights were charged until after the coal was shipped away from wharf. Then freight bills were rendered to the shipper for the net amount of the freight, depending upon the consignment.

Q. But during these years, 1895, 1896, 1897 and 1898, and 1900 and 1901, your company in making shipment from Clearfield to Philadelphia, always paid the schedule or open rate, and got the money back afterward, whatever reduction was made?

A. They did.

Q. They never pursued any other course?

A. No, sir.

Q. In naming the rate per ton that you were to get back, was that on the basis of any open, acknowledged custom or communication to the trade by the railroad company of anything in writing? Did they issue any circular saying that they would make this, that or the other reduction?

A. I think they did during part of that time, if my recollection serves me right, but it was a well-established open rate.

Q. Was it also well established what everybody would get back?

A. I think not.

Q. So that as to the amount you would get back, that was an open question?

A. It was.

Q. You would ask a certain sum, and the railroad would pay you a certain sum. Did they always pay you as much as you asked?

A. We made the request of the railroad company to be placed on the most favorable basis of freighting, without, as my recollection serves me, naming any particular net rate.

Q. Did you conduct those negotiations with Mr. Joyce and Mr. Searles yourself?

149 A. I did.

Q. Illustrate by saying what you would say on such an occasion to either of them, when you would present such a statement, as to how much you wanted to get back. I think you said you put in the statement how much you ought to get back?

A. You probably do not understand. The railroad company would render a freight bill for so much money per ton on coal consigned to Greenwich Piers. When the coal was loaded and shipped from Greenwich, we would then make up a statement at the end of the month, showing the shipments of the preceding month, the point of consignment, and the net rate which was agreed upon to be applicable to shipments made to such a point.

Q. The net rate was lower than the schedule or open rate?

A. Lower than the rate charged by the railroad company in the first account.

Q. But that rate charged in the first account was what was called or known as the published rate?

A. Yes, sir.

Q. The same as Interstate Commerce would be?

A. The same as is published today in their schedule. I do not mean the same figures.

Q. Then, there being at a given time that open, published, schedule rate, you would, before making contracts with your customers, ascertain how much below that the net rate would be, would you not? You had to know that to know how to deal with them?

A. We would ascertain the net rate which they would make for us to Greenwich for shipments to points beyond, before we would enter into contracts.

Q. Then that caused you to communicate from time to time with Mr. Searles, or whoever was in charge, to ascertain what that would be before the contracts were made?

A. I did.

150 Q. When you would apply for a rebate, would you be required to name the persons with whom you had contracts?

A. Not always.

Q. You did sometimes?

A. Sometimes.

Q. When you were so asked, did you furnish the contract itself?

A. We did; and then furnished copies, or furnished data applicable.

Q. At all events you would furnish information to the railroad company to show what contracts you had made?

A. We would.

Q. And on the basis of those contracts you would have an adjustment in advance with the railroad company as to what would be the net rate that you would be charged?

A. We did.

Q. They complied with that arrangement with you?

A. They did.

Q. So that you knew, when you made a contract with a customer, that you would get back a certain amount from the schedule rate existing at the time the contract was made?

A. We did.

Q. You always got it back?

A. So far as I know.

Q. As far as you know, no one else got any more back?

A. As far as I know.

Q. Some of your contracts were for periods that would overlap or go beyond the following April 1st. I want to know whether you reported those contracts to the railroad company?

A. We did when we were asked to do so.

Q. You did make such contracts, and reported them whenever they requested you to furnish the information?

151 A. We had contracts expiring at various times through the year, extending beyond the termination of what is usually called the coal year, March 31st.

Q. In the case of such contracts, when the schedule rate was lowered and the net rate correspondingly lowered from the previous year, did your company get the benefit of the lower rate when it overlapped the first of the succeeding April?

A. To my recollection, if the contract had not been registered or reported to the railroad company, we did. If there had been registration or report to the railroad company of a contract extending beyond, we did not on consignments made under such a contract.

Q. Do I understand that if you reported a contract on the 1st of January, which was to expire the 1st of July, so that it would overrun the succeeding 1st of April, to the railroad company when it was made, and the rate was lowered on the 1st of April, you mean to say you were charged the higher rate for the balance of that period after the next succeeding April 1st?

A. To my recollection, we were if we shipped under that contract. We only reported contracts to the railroad company when requested to do so by them, and in most instances such a report was not made.

Q. In other words, you did not feel called upon to report it unless they asked you?

A. No.

Q. Is it not a fact that from time to time during this period we are discussing there were overlapping contracts on which at a particular time there was a reduction of freight after April 1st of the current year, and your company got the benefit of the reduction where you had not reported the contract?

A. Where we had not reported it, we would, certainly.

Q. You did?

A. Certainly.

Q. Take the reverse, where there was a contract that
152 overran the next succeeding April 1st, and there was an
increase in the freight rate, did you not get a rebate, so as
to make the net amount paid what had been agreed upon in advance
with the railroad company should cover that contract?

A. Prior to the large advance in freight rates, which was in 1900
or 1901—I do not remember the year—we frequently did. At that
time we were notified, in the preceding Fall, if not in the Summer,
that all rates then in existence were terminated with the coal year,
March 31st. I do not recall the year when that advance took place.
We had some overlapping contracts, but we got nothing back from
the established rate.

Q. You got nothing back from April 1st, 1900?

A. If that was the year. I do not from memory recall the year
of the large advance in rates.

Q. I will read you something from the testimony of Mr. Walker
on that point: "Q. Had you any such contracts that expired after
the 1st of July, 1900, or at any time in 1901? A. I think we had.
Q. You recall, did you not, that on the 1st of April, 1900, the rate
to Greenwich Point was increased? A. Yes, sir. Q. It was doubled
from the previous year? A. Yes, sir. Q. That is within your
knowledge? A. Yes, sir. Q. Is it not a fact that in the case of
contracts such as you have mentioned that during 1900 and 1901
your company got the benefit of the prior lower rate of fifty-five
cents a ton, and did not pay the increased rate of one dollar and
ten cents? A. They paid one dollar and ten cents. Q. And got it
back? A. And got it back. Q. They got fifty-five cents a ton
back? A. Yes, sir." I want to know if that is correct?

A. From my recollection there was a year—whether it was in
1900 or 1901 I could not say without carefully looking it up—
when the railroad company refused to refund us after April 1st
any difference between the rate which had been in existence
153 prior to that time and the new rate, although I frequently
asked for it.

Q. Do you mean to say Mr. Walker is wrong?

A. If that is the year. I do not recall the year. I recall the cir-
cumstances, because it was I who had it in charge.

Q. Are you prepared to say that as of the whole period from
1895, covering 1896, 1897, 1898, and so on, the entire period of
time, there never was any time when, there being a subsequent in-
crease in the rate, your company did not get back the difference on
an overlapping contract?

A. No; because we did in some instances.

Q. Your books would show this condition of things? You could
get accurate information from them?

A. They would show the net rates received in the various years.

Q. They would show what you paid, and also what you got back?

A. Yes, sir.

Q. Those were permanent books?

A. Those are in letter-press books.

Q. Were they not entered in any account, sundries, coal, or some such account as that?

A. No. The statements rendered the railroad company were copied in letter-press books.

Q. But entries were made in your permanent books to show that you got back a certain amount of money. I want to know under what account they were entered.

A. Freight rebate account, I think we call it.

Q. At all events, it had a well-ascertained name?

A. Yes, sir.

Q. They were part of the permanent books of your company?

A. Yes, sir.

Q. Bound books. They were not loose papers?

A. Yes, sir.

154 Q. Those books are still in existence?

A. Yes, sir; as far as I know.

Q. Had you any coal contracts with any steamship companies other than the Clyde Line?

A. With foreign steamships, trading to this port.

Q. Is it not a fact that their contract always extended to a period of time beyond the succeeding April 1st, and that they would not make them in that uncertain way?

A. Speaking generally, I should say all of our steamship contracts of that nature expired on the 31st of December.

Q. What is the coal year for steamship coal?

A. Steamships of that nature, which are foreign steamers, run the calendar year.

Q. Before you would make contracts of that nature for foreign steamers touching at the port of Philadelphia, you would report them, would you not, to the railroad company, so that you might know what was the net rate you would pay during the whole of that period to cover those contracts?

A. I do not think I quite understand your question. I would not report anything to the railroad company before making the contract.

Q. You would make the contract without knowing what you would get back, and then tell the railroad company you had made the contract?

A. Contracts of that nature are made in Europe, in the Fall of the year, to take effect January 1st and run the calendar year. Therefore they would be entered into and not reported to the railroad company at all, unless they requested a list of them at some future time in the ensuing year.

Q. How then were you able to know, in dealing with your customers in such cases, what amount you would get back from the schedule rate, what net rate would be fixed? Did you not have that arrangement with the railroad company?

155 A. Sometimes the railroad company would advise us in the Fall of the year what rate of freight would go into effect to Greenwich the coming April. That would go into effect on steam-

ship business in January. Oftentimes they would not give us any information.

Q. Then on some of your contracts for steamship coal the rate was fixed irrespective of the rate simply to Philadelphia?

A. No; the rate to Philadelphia for delivery to steamships was the same as the rate to Philadelphia for shipment outside of the capes.

Q. But your arrangement with the railroad simply covered the delivery of the coal at Greenwich Point. It did not go any further. Then it was taken up by the steamer itself. They got the coal.

A. No; we delivered the coal into the steamship's bunkers, but as far as the railroad was concerned, it ended with loading it on a lighter at Greenwich.

Q. Then you did know as to that what would be the net rate that you would be charged on a contract that would not expire until the following December 1st?

A. Sometimes.

Q. Was not that generally the case?

A. That I cannot say, because a large part of our business is not tributary to the Pennsylvania Railroad.

Q. You would bring part of your coal by the Reading?

A. Yes, sir; to New York City and Philadelphia.

Q. There was no difficulty in bringing coal from the Clearfield region to Philadelphia or to other points in Pennsylvania by way of the Reading, was there?

A. To points inland, none that I know of.

Q. The steamship coal was all by the Pennsylvania Railroad, was it not?

A. No; much of our steamship coal was by the New York Central and Philadelphia and Reading systems.

Q. That is to points in Philadelphia?

156 A. That is to Port Richmond, Philadelphia harbor.

Q. Coming from the Clearfield region, it was just as easy to use the Reading as the Pennsylvania?

A. No; it never touched the Pennsylvania Railroad at any place. It originated on the New York Central system—the New York Central and Hudson River Railroad.

Q. Did it not in a portion of what was called the Clearfield region originate on both systems?

A. The Pennsylvania Railroad did not have anything to do with coal shipped from the Clearfield region via the New York Central.

Q. But from those points in what is called the Clearfield region, in dealing with the Pennsylvania Railroad, could not coal be shipped by way of the Reading to points in Philadelphia harbor, and were they not within the same territory that in the Pennsylvania Railroad shipments was commonly known as the Clearfield region?

A. The Pennsylvania Railroad have always had a freight schedule to all inland points via the Philadelphia and Reading Railroad from Harrisburg, but they have not, and never did have, to my knowledge, any rate of freight to Port Richmond for shipment on to boat and into Philadelphia harbor and for out of the capes.

- Q. You mean the Pennsylvania Railroad has not?
A. Yes, sir.
Q. You have mines that can reach either road?
A. We have mines that are located on each road. We do not reach both roads from the same mine.
Q. You have some mines located on the Reading?
A. On the New York Central. The Reading does not reach the region at all.
Q. The repayments that you got were all by check from the railroad company, were they not?
A. So far as my knowledge serves me; yes.

157 CHARLES V. BERGH, SWORN.

By Mr. NEWLIN:

- Q. What is your business?
A. Coal business.
Q. What company are you connected with?
A. The Commercial Coal Mining Company.
Q. How long have you been connected with that?
A. Since 1903.
Q. During this period from April 1st, 1894, to April 1st, 1898, and from July 1st, 1900, to March 18th, 1901, with what company were you connected?
A. The Mitchell Coal and Coke Company.
Q. What was your position with that company?
A. I was shipping coal, and had charge of the pay rolls. We were simply a mining concern until 1898. We had no Philadelphia office. We shipped and sold all coal east to the Columbia Coal Mining Company.
Q. Where did you ship it from?
A. The Clearfield region.
Q. Some of these shipments were for Philadelphia, were they not?
A. Yes, sir.
Q. Partly to Greenwich Point and partly all-rail for points of delivery in Philadelphia, were they not?
A. Yes, sir.
Q. Had you any steamship business?
A. No, sir.
Q. Why was it that the shipments were not made on your own account?
A. Mr. Mitchell was a stockholder in the Columbia Coal Mining Company, and all the coal shipped east was sold to them. They paid us a net price for it, and we knew nothing about freight rates.
Q. So that if any money was repaid out of those freights that were paid on this coal it came to the Columbia Company, and not to the Mitchell Company?
A. Yes, sir.
Q. Did not the Mitchell Company sell out their business to some other company afterwards?

158 A. To the Webster Coal and Coke Company.

Q. In what year was that?

A. 1901.

Q. Was it prior to March 18th?

A. No; it took effect on May 1st, 1901.

Q. Was there not a Mitchell Coal Company, an incorporated company, and also Mr. Mitchell in business for himself?

A. No; all the coal was shipped through the Mitchell Coal and Coke Company.

Q. Mr. Mitchell did operate mines himself, did he not?

A. He did at one time previous to that.

Q. Was it during any of this time from 1894 to 1898 or 1900 and 1901?

A. In a way. Mr. Mitchell has a couple of leases in his own name, but all the coal was shipped and billed by the company.

Q. Whether it was the Mitchell Coal Company or J. L. Mitchell & Co. as a firm, it all went to the Columbia Coal Company?

A. Yes, sir.

Q. Whatever repayments on freight were made, were made to the Columbia Coal Company?

A. Yes, sir.

Q. None of it came to your company?

A. No, sir.

Q. Did you sell at the mine at a certain price?

A. We sold at the mine.

Q. So much at the mine?

A. Yes, sir.

Q. You paid none of the freight, and had nothing to do with it?

A. No, sir.

Q. Were these arrangements between Mitchell & Co. or the Mitchell Company, Incorporated, and the Columbia Coal Company, written contracts?

A. No; not to my knowledge. I do not think we had any written contract. Mr. Mitchell would fix a price with the Columbia
159 for the year, based upon the rate of mining, on the cost of coal, and as long as we were paying that mining rate we got that price for the coal at the mine.

Q. Those contracts were irrespective of the freight rate, and had nothing to do with it?

A. They had nothing to do with the freight.

Q. For what length of time were they usually entered into?

A. Some coal was sold clear up to the 1st of April. Other coal was sold in lots of five thousand or ten thousand tons. It may have been a different price.

Q. Had you any contracts for the delivery of the coal which you mined with the Columbia Coal Company, that would run beyond April 1st of the current year?

A. All contracts were based on the rate of mining. If the rate of mining changed the next April, or the market would warrant an increase in price, we got it.

Q. Your price was fixed according to the cost of mining?

A. Yes, sir.

Q. It was so much a ton, based upon the cost of mining at the time the contract was made?

A. Yes, sir.

Q. With the understanding that if the cost of mining increased you were to get the increase?

A. Yes, sir.

Q. It had nothing to do with the freight rate?

A. Nothing whatever.

Q. But such contracts as you are now speaking of did not terminate on the 1st of April. You did not regard the 1st of April at all, as it had nothing to do with freight rates?

A. We usually did, because the miners' wages are usually fixed about the 1st of April, and all other contracts that they make are probably made until April, and we made ours accordingly.

160 Q. Do you know of any of these contracts having been in writing?

A. I do not think any of them were. They were simply verbal understandings.

Q. You knew, as part of the business of the company, what the verbal understandings were from time to time?

A. Mr. Mitchell always made those deals himself.

Q. But he would report them to you?

A. He would report the price; yes, sir.

Q. So you would know what the price was in dealing with the Columbia Coal Company for subsequent shipments?

A. Yes, sir.

Adjourned until April 25th, 1905, at 3.30 p. m.

PHILADELPHIA, April 25th, 1905—3.30 p. m.

Present: Mr. Newlin, Mr. Gowen and Mr. Sellers, of counsel.

JOHN C. BRADLEY, SWORN.

By Mr. NEWLIN:

Q. You are the president, are you not, of the Sterling Coal Company?

A. Yes; at the present time.

Q. Are you general manager also?

A. Yes, sir.

Q. The questions I will ask you will all have relation to this period, April 1st, 1894, to April 1st, 1898, and July 1st, 1900, to March 18th, 1901, and will relate to shipments from the Clearfield region in Pennsylvania to Philadelphia. Between those dates,
161 did your company make shipments of coal by the Pennsylvania Railroad from the Clearfield region to Philadelphia?

A. Yes, sir.

Q. Did you ship by the Reading?

A. No, sir.

Q. Was your company an operating company during that period? Did you mine coal yourself as well as ship it?

A. We mined coal under contract. We had our own mines, and contracted the coal to be put on the cars at the mines and it was the same thing. We were an operating company.

Q. You contracted with the owner of the property. Did you mine on royalty or did you own the mines?

A. We leased the property.

Q. You leased the property from the owners and paid them royalty?

A. Yes, sir.

Q. But the coal itself that was mined by your company, was shipped by your company, from the Clearfield region either to Greenwich Point or other points in Philadelphia?

A. Yes, sir.

Q. Did you ship in that period any coal that you had got from other companies that had mined it?

A. I think it is quite likely. You mean we purchased coal from other companies?

Q. Purchased coal in the Clearfield region, from other companies that had mined that coal, and then it came forward here with your company as consignor?

A. Yes, sir.

Q. I suppose the manifests would state the mines from which it came, as well as your company as consignor, would they not?

A. I think so. I am not quite sure.

Q. In naming the mine where your company was not the producer of the coal, would it name the company that produced the coal as well as name the mine?

A. I do not think it would, on the manifest; no. The
162 manifest would be signed on consignments which we gave the parties to ship on. For instance, the Sterling Coal Company, Greenwich.

Q. Then you would figure on those shipments as consignee?

A. Yes, sir; they would be consigned to us from the mines.

Q. They would be consigned from yourselves to yourselves? Is that it?

A. No; we would buy coal at the mines from these other people. They would ship it according to our directions. If it was to Greenwich it would be sent to the Sterling Coal Company, Greenwich, by this other party, whoever it might be.

Q. Then the manifest would show the name of the mining company?

A. I am really not quite certain. It probably would.

Q. It would show, at all events, that it was forwarded from the Clearfield region to Greenwich Point, or some other point in Philadelphia, by direction of the Sterling Coal Company?

A. That is right; yes, sir.

Q. Did you handle the output of any other operating company, in which shipments you would be the consignor? You would purchase from them and consign coal that you had purchased from

them, from the Clearfield region either to Greenwich Point or other points in Philadelphia?

A. Do you mean to say the entire output of those parties?

Q. No; but any considerable amount of it?

A. I think it is quite likely. We bought from several different parties.

Q. Did you take the entire output of any other company?

A. Not to my knowledge.

Q. What were the principal companies from which you purchased in the way you have mentioned?

163 A. I could not name any of them.

Q. Are they not still in existence?

A. That I do not know.

Q. Speaking in round figures, did the purchased coal that was shipped in this way by you from the Clearfield region, make the bulk of your shipment, or was the bulk what you had mined yourselves under your lease?

A. I think it was a large portion.

Q. The purchased coal was a large portion?

A. A large portion at that time.

Q. Was it the larger portion?

A. No, I do not think it was.

Q. Did you get any repayments on those shipments from the Pennsylvania Railroad from time to time?

A. Do you mean overcharges on freight?

Q. On any account, did you get money back from the Pennsylvania Railroad Company?

A. Certainly.

Q. You usually got it monthly, did you not?

A. No. Sometimes we did not get it for two or three months.

Q. Then there were also other settlements, without regard to any period of time, lump settlements, were there not?

A. We rendered bills to the Pennsylvania Railroad monthly, and sometimes they paid them monthly. Oother times they would run on two or three months.

Q. Did they not sometimes have a sort of omnibus settlement later on, when there would be a lump payment and a general clearing up?

A. I think they had towards the last, before the rates were changed.

Q. That is towards 1900?

A. Yes, sir.

Q. When you got those repayments, you made statements, did you not, to the Pennsylvania Railroad Company, showing the
164 basis on which you claimed to have a repayment, showing your shipments, the points from which and to which they were shipped, the tonnage, the dates and the car numbers? All those things were given, were they not?

A. Car numbers in certain cases, yes. Otherwise it was cargoes.

Q. But at all events you gave in your statements enough information to the railroad company, as you sent them in monthly, to

enable the railroad company to verify your claims from their own books?

A. Yes, sir.

Q. That was the object of making those statements?

A. Yes, sir.

Q. When you got money back in that way, in what account was it entered in your books?

A. What we paid for freight we charged to transportation, and what we got back we simply credited to transportation.

Q. So that both sides of the freight account were under the head of transportation?

A. Yes, sir.

Q. Those payments then entered eventually into the permanent bound books of your company, the same as with the other companies that have been here?

A. Yes, sir.

Q. You still have those books?

A. We have them up to within six years, back, I think.

Q. You do not destroy the bound books, do you?

A. We do, I think, every six years, but I am not quite sure of that.

Q. I would like you to look at that, and let me know at another time, because the other companies that have been here, I think, have all testified they kept the bound books, but that the temporary settlements, tissue paper copies, and such things, are destroyed because they accumulate.

A. I know.

165 Q. Are the entries in the bound volumes preserved?

A. They may be down at the office.

Q. Did you make any of these settlements yourself? Did you go to the company?

A. Generally, yes, sir.

Q. Whom did you usually see?

A. Mr. Joyce.

Q. When you were going there, what argument did you use for getting anything back? What would you say to him?

A. That is a pretty hard question to answer.

Q. The story was always pretty much the same, was it not? It did not vary a great deal, did it?

A. It was necessary to have rebates made on account of meeting competition from other roads.

Q. I want you to give the reasons in your own way. That was one reason.

A. It was necessary to give them in order to do business with any profit. What was said, of course, I cannot recollect.

Q. In the case of the shipments from the Clearfield region by your company, with what roads was there any competition?

A. The Baltimore and Ohio, the Norfolk and Western, and the Chesapeake and Ohio. The coal was coming over foreign roads, also the Beech Creek.

Q. So that any of those roads could have been used, and that made the competition with the Pennsylvania for your shipments?

A. Exactly; competitive roads.

Q. You urged that upon Mr. Joyce as a business reason why a certain rebate should be allowed?

A. Exactly.

Q. What would Mr. Joyce say to that, on the subject of competition?

A. I cannot recollect.

166 Q. When you would claim that unless you got a rebate you could not fill your contracts at a profit, would he ask you for a memorandum or any statement as to what running contracts you had, and the price at which you were selling, so as to verify, or satisfy himself whether it was necessary to give you a rebate to make a profit?

A. He was perfectly familiar with our business. We had a regular trade of our own, which we had held for years and years.

Q. He knew that trade?

A. He knew that trade, and was informed about it.

Q. Did you keep him advised from time to time in a general way as to the course of your trade, your customers and the price?

A. Yes, sir.

Q. Therefore he had pretty much the same information you had in a general way?

A. In a general way.

Q. Did you always get all you asked, or did he cut it down sometimes?

A. Sometimes it was cut down.

Q. That during all this period, was, in a general way, the course of dealing, was it not?

A. I think it was generally with every coal man, that is my impression.

Q. You understood, did you not, and it was understood in the trade, that some money was being gotten back, as a general thing by shippers and you wanted as much as anybody else, and all you could get, that is about it, is it not?

A. I wanted the same rate as other people, and I believe I got it. I think every party got some rebate, because it was necessary for them to get it in order to meet this competition from these other roads.

Q. Where were these mines that you were operating as the Sterling Coal Company, under leases?

A. They were in Cambria County.

Q. That is part of what is known as the Clearfield region?

A. The Clearfield region.

167 Q. Had you any way of reaching directly any of these competing roads, or was your sole connection with the Pennsylvania Railroad Company?

A. Our sole connection was with the Pennsylvania Railroad Company. They could not bring it over any other road.

Q. So that in your case you could not have used any of the other roads for your tonnage?

A. No, sir.

Q. Owing to the situation of your mines?

A. That is right.

Q. That being the case, there could have been no competition as to your shipments. That is to say, you could not have gone to the other roads, and said, "If you will give us a better rate we will take our tonnage from the Pennsylvania." You were not in a position to do that, were you?

A. No, sir.

Q. When you speak of competition, you mean competition with other shippers of coal, who would bring their coal by the other roads?

A. Exactly.

Q. You had overlapping contracts, had you not, that would overlap the 1st of April of the current year?

A. I think we had a few overlapping contracts when this thing ended. I think it was 1900 it ended. I am not quite sure of the date.

Q. It has always been contended that the rebates ended in 1900. That has been the contention of the railroad. Fixing that date in your mind, prior to that, you did have overlapping contracts? Those overlapping contracts would last until, say, the 1st of July, 1900?

A. Some would run two months and some would run three months. I think July was about the period, because we had to sell coal to customers to the period that they wanted a contract for.

Q. Your contracts that would overlap were usually for the
168 reason that for the convenience of your customers you made the contracts expire the 1st of July, and not the 1st of April?

A. Exactly; or some other time longer than that, or shorter than that.

Q. Some of the contracts were for a considerably longer period than a few months, were they not?

A. No, I do not think so.

Q. Had you not some customers with whom you had a sort of running understanding without fixing a date, that they could have coal until further notice at a certain rate?

A. No, I had no contracts of that kind.

Q. Had you not a course of trade with certain old customers who could rely upon getting coal from you, even beyond the 1st of April, for a longer period in the current year, unless you notified them in advance when there was going to be a change in the rate?

A. No; I do not think I had any understanding of that kind.

Q. Who were some of the people that you had these overlapping contracts with prior to 1900?

A. I cannot recall the names.

Q. They were old customers, were they not?

A. Yes, sir; customers of long standing.

Q. Do you recall any of their names?

A. No.

Q. Was not any of it steamship coal?

A. I cannot define it in that way.

Q. At all events your books will show these accounts, the accounts between your company and these customers are still preserved, are they not?

A. The books are, that is, the general books.

Q. They contain all this information that I am asking you now?

A. I presume they do.

Q. When you made contracts that would overlap, they were in writing, were they not?

169 A. I do not think they do overlap.

Q. I mean overlapping April 1st of the current year. You have just said they might run along until July. I am speaking of those contracts.

A. I would go to the man in June, probably and get his contract from July 1st to the next July. Certain customers did that. Others ended on the 1st of April.

Q. You have some books, have you not, that would show those contracts, or show what were the times covered, that is to say, if you made a contract with a man on the 1st of July to cover up to the 1st of next July, there would be something in your books to show the length of his contract and the price that he was to receive coal for, would there not?

A. No, I do not think so. I think that would be a matter of the bill. I think the bill would be the only thing that would show, because the contracts would be destroyed.

Q. What record would you have, the contracts themselves?

A. A copy of the contracts. The contract itself was a memorandum.

Q. Then it would be executed in duplicate, and you would have one and the other side would have one?

A. The other side would have one.

Q. Those contracts were reported to the railroad company, when they overlapped?

A. In most cases.

Q. That was the custom between the railroad company and your company? You were expected to report them?

A. Yes, sir.

Q. In that event they know that you had such a contract and that it did overlap?

A. From a certain period to a certain period.

170 Q. You probably remember that the rates were raised in 1900. That is to say, after the 1st of April, 1900, the rates were doubled to Greenwich Point from the Clearfield region, running up from fifty-five cents to one dollar and ten cents. You recall that, do you not?

A. I cannot say as to the exact figure. I know they were raised.

Q. Is not your recollection practically that they were doubled at that time?

A. No; I thought it was from fifty-five cents to one dollar.

Q. It is in that neighborhood, at all events?

A. Yes, sir; I remember the fifty-five cents.

Q. And you remember afterwards it was jumped up at all events, to one dollar?

A. It was jumped up considerably.

Q. The same thing was done, was it not, by these competing roads? They raised their price, all of them, from fifty-five cents to one dollar, or one dollar and ten cents, or whatever it was the Pennsylvania made?

A. I believe that was the understanding between the roads.

Q. At all events it was your understanding in the trade that if you had been in a position of having your rivals ship by other roads, as you have mentioned, you would all have to pay in 1900 that same increased rate that the Pennsylvania adopted?

A. I presume so.

Q. That increase having taken place, April 1st, 1900, from fifty-five cents to either one dollar or one dollar and ten cents, in the case of your overlapping contracts, you got back the difference between fifty-five cents and the increased rate?

A. Yes, sir; if they were registered with the railroad company.

Q. Your belief is that they were all registered that overlapped at that period?

A. I think so.

Q. You would pay the full rate and get this much
171 back. Those repayments would then be entered in transportation account, the same as the others?

A. Yes, sir.

Q. No separate item?

A. No separate item.

Q. Was there any way of distinguishing the times of shipment by reference to the dates of the payments, or would they be just entered in transportation account on the day you received the money back?

A. Just simply credited on transportation.

Q. Like so much cash received on a certain day?

A. So much cash.

Q. Was there anything to distinguish between overlapping contracts and contracts that did not overlap?

A. For contracts that did not overlap we got nothing back, as I understand it.

Q. Your understanding was that when this raise was made in 1900, in those cases where you had no overlapping registered contracts with the railroad company, you paid the increased rate and got nothing back?

A. Exactly.

Q. Your belief is, that you did not get anything back, except on these overlapping contracts?

A. I am very sure of it.

Q. Were you ever told by Mr. Joyce, or any one else representing the railroad company that you must not make overlapping contracts?

A. I cannot remember, but probably I was told that

Q. You nevertheless did make them in the instances you have mentioned, and reported them to the railroad?

A. Yes, sir.

Q. Was any objection made when you reported or registered a contract in that way, to your having made an overlapping contract?

A. None to my knowledge.

172 Q. Does your company own its own cars, or were part of your shipments made in your own cars?

A. Yes, sir.

Q. Were all your shipments made in your own cars?

A. No; we used a great many Pennsylvania cars.

Q. What the railroad company pays you for the use of your cars is called car service?

A. Yes, sir.

Q. The amount you received from the railroad company for car service was kept in a separate account, was it not?

A. Altogether.

Q. Under the head of car service?

A. Yes, sir.

Q. Were contracts made between the railroad company and your company, setting forth what the payment would be, and on what basis you would be allowed payments for the use of your own cars?

A. No; there was no contract made. It was the usual car service allowed to everybody.

Q. There was an announced or published rate?

A. Yes, sir.

Q. State what that was.

Mr. GOWEN: Objected to as this relates to a matter that is not at all relevant to the issue in the case, and inasmuch as there is no one here to pass on the question of the relevancy of that evidence, I would be glad if you would decline to answer until you have consulted your own counsel as to whether that is a matter which you should answer.

Mr. NEWLIN: Mr. Newlin desires it noted that he does not recognize the right of Mr. Gowen, for the railroad company, to give this advice to the witness to consult counsel as to what questions he shall answer. He may decline to answer and have the question
173 certified. He may decline to answer any question he sees fit, but he cannot have counsel. Mr. Newlin further states that this question is relevant, because he proposes to show by this witness and other witnesses that this car service payment is made use of as a means of giving a rebate to those shippers who have their own cars, and it is therefore perfectly relevant to the issue raised by the pleadings in this case.

Q. Do you want to consult your own counsel as to answering that question, because if you do I will not press it. I do not recognize your right. At the same time I do not care to press it, if you prefer to consult with your counsel.

A. I would like to please Mr. Gowen very much, but I think I can answer that question very readily.

Q. Do you want to consult your counsel? If you do, I have no objection. You can come back at the next meeting.

A. I will consult my counsel.

Q. Among the stockholders of your company are there any persons who are officers or directors of the Pennsylvania Railroad Company, or is any of your stock held for any of those persons?

Mr. GOWEN: I object to that question, upon the ground that it relates to a matter that has nothing to do with the issues in this case, and I make the same request of the witness.

Mr. NEWLIN: Mr. Newlin replies in the same way as he has with regard to the last question, and also states that it is directly charged in the plaintiff's statement in this case that officers and directors or persons connected with the Pennsylvania Railroad Company are interested in the rebates paid to certain companies by reason of their being stockholders in those companies, and that it is open to him either to have these questions certified to the Court to be passed

174 upon, or to call those persons who are believed to be stockholders in the circumstances intimated, and that Mr. Newlin will pursue one course or the other, but that if Mr. Bradley, as in the case of the last question, would prefer to consult his counsel, he may do so.

The WITNESS: I would.

Q. Have you any tracks of your own, other than ordinary sidings, that connect your mines with the Pennsylvania Railroad Company?

A. None but the sidings.

Q. What is the longest of those sidings? Are they of any considerable length?

A. No; half a mile, maybe, to load cars and empty them. They belong to the Pennsylvania Railroad Company.

Q. The cars?

A. No, the sidings.

Q. Have you any that your company owns?

A. No.

Q. So that the entire trackage is furnished by the Pennsylvania Railroad?

A. Yes, sir.

Adjourned until May 2d, 1905, at 3.30 p. m.

XVI. *Opinion of the Court Below.*

Sur Rule on William A. Patton for Attachment for Contempt for Failure to Obey Subpœna to Appear Before a Notary on the Taking of a Deposition.

SULZBERGER, P. J., July 26th, 1905:

The question involved in this case is whether a witness subpœnaed by the plaintiff, being neither an ancient, infirm, nor going witness, may be attached for contempt for refusing to appear and testify before a notary.

The rule authorizing the examination of such witnesses
 175 as of course was promulgated by the old District Court on
 July 3rd, 1837. The depositions thereunder were to be taken
 before a judge, justice of the peace, alderman, or commissioner ap-
 pointed by the court.

By the Act of August 10th, 1864 (P. L., 962), the power to take
 depositions was conferred on notaries, and the rule of court has been
 enlarged in conformity with said Act.

The Act of February 26th, 1831, section 1, (P. L., 92), expressly
 authorized the persons named in the commission or rule to issue
 subpœnas to witnesses, and in the event of default, to attach them.
 No such power has ever been expressly conferred on notaries, and
 hence the practice has been to take the subpœnas out of the Pro-
 thonotary's office and to apply to the court in case of default.
 (Trimble vs. Barnard, 15 W. N. C., 127.)

It is now contended on behalf of the witness that his refusal to
 testify before a notary entails no consequences; that the notary, hav-
 ing no express power, can do nothing; and that the witness' default
 not having been in a proceeding before the court itself, the latter is
 equally powerless.

This contention, we think, is erroneous.

The notary is undoubtedly qualified to take the deposition in
 question. To obstruct him in the execution of his office is a public
 injury and is indictable.

Brooker vs. Commonwealth, 12 S. & R. 175.

Under the law as laid down by Mr. Justice Gibson in that case,
 we would, prior to 1836, have had the power to commit summarily
 for contempt any one who acted as the witness has done.

By the Act of June 16th, 1836 (P. L., 23), however, our power
 was restricted. And though it still included the case of a witness who
 disobeyed or neglected the lawful process of the court, this
 176 power seems to have been construed away, in part, by Com-
 monwealth vs. Newton (1 Grant., 453).

It was there held that a failure on the part of a witness to appear
 before an Examiner, in obedience to a subpœna is not a contempt of
 court, but a contempt of the process of law; and further, that a wit-
 ness in contempt for not obeying a subpœna can only be punished
 by fine.

We do not clearly understand the distinction made by Mr. Justice
 Woodward between contempt of court and contempt of the process
 of the law, but apprehend it to be the same as that drawn in many
 cases between "direct" and "constructive" contempt of court. (Ra-
 palje on Contempts, sections 22-24.)

The decision in that case, that the court could not punish be-
 cause the Commissioner could, has no bearing here, because the
 notary having no power to punish, the inherent power of the court
 to enforce its process remains intact. The witness, though liable in
 an action by the party aggrieved, and also by indictment for the
 offense of obstructing justice, is, in our opinion, not freed from pun-
 ishment by fine.

Our conclusion, while protecting all parties against the contu-

macy of witnesses, cannot lead to the hardships which seem to have been feared. Though the rule for depositions is a rule, of course, that does not mean that the supervision of the court is withdrawn. The formal allocatur for the writ is initially dispensed with, but if the liberality of the court be abused and the rule be used for unlawful purposes, such as to pry into matters irrelevant to the issue, or wantonly to interfere with the labors of citizens in their lawful occupations by exacting attendance at unreasonable times or places, relief will be granted on application to the court, either by prescribing the mode of procedure to be pursued under the particular circumstances, or, if the facts warrant such action, by quashing the writ of subpoena itself or vacating the rule under color of which oppression is sought to be exercised.

177 As the witness in this case has acted under the direction of counsel, and we see no reason to doubt that he believed his point of law well taken, we direct the case to stand over to the third Monday of September, in order to give him an opportunity to appear before the notary and testify, or otherwise to come into court and set forth such matters of fact as he may deem pertinent to show cause why the rule for attachment should not be made absolute.

XVII. *Supersedeas Indorsed on Writ of Certiorari in re Appeal of William A. Patton.*

And now, this fifteenth day of September, A. D. 1905, it is ordered that the appeal taken in this case shall operate as a supersedeas, and that any proceedings under or for the enforcement of the order of the Court of Common Pleas No. 2, for the County of Philadelphia, of July 26th, 1905, from which the appeal has been taken, shall be stayed pending and until the determination of said appeal.

MITCHELL,
Chief Justice.

True copy from the record.

In testimony whereof, I have hereunto set my hand and the seal of said court at Philadelphia, this fifteenth day of September, A. D. 1905.

[SEAL.]

LEWIS C. GREENE,
Deputy Prothonotary.

178 XVIII. *Letter of Plaintiff's Attorney, James W. M. Newlin, Esq., in re as to Knowledge of Supersedeas in re William A. Patton's Appeal.*

INTERNATIONAL C. M. Co.,
vs.
PENNA. R. R.

SUNDAY EVE.

DEAR MR. MACCAIN: This case is on the current motion list—I think about 36, and also on miscellaneous arg. list.

36 is Patton's contempt proceedings. Please say to the Court for

me that Patton took an appeal to S. C. and a supersedeas was allowed on 15th inst., so that will go off the current list.

The matter on the miscellaneous argument list has been decided in my favor by the Court and it will go off the list.

Mr. Hepburn has the case also on the new trial argument list but I have nothing to do with that case.

Yours truly,

J. W. M. NEWLIN.

(Endorsed: 3929. C. P. No. 2. J. '04. International Mining Co. vs. Railroad Co. June Term, 1904. No. 3929. Letter from James W Newlin, Esq., to the Court Clerk. Filed at bar Sep. 18th, 1905, by order of court. A. J. R.)

179 XIX. *Supersedeas in re Appeal of John Lloyd.*

In the Supreme Court of Pennsylvania, Eastern District, January Term, 1905.

No. 286.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

JOHN LLOYD, Appellant.

Sur Writ of Certiorari sur Appeal to the Court of Common Pleas No. 2 for the County of Philadelphia. No. 3929, June Term, 1904.

In re Petition for Supersedeas.

And now, this ninth day of October, A. D. 1905, it is ordered that the appeal taken in this case shall operate as a supersedeas, and that any proceedings under or for the enforcement of the order of the Court of Common Pleas No. 2, for the County of Philadelphia, of June Term, 1905, from which this appeal has been taken, shall be stayed pending and until the determination of said appeal.

Per curiam:

MITCHELL, C. J.

True copy from the record.

In testimony whereof, I have hereunto set my hand and the seal of said Court, at Philadelphia, this tenth day of October, 1905.

[SEAL.]

LEWIS C. GREENE,

Deputy Prothonotary.

180 (Endorsed: 69. April Sessions, 1904. C. C. U. S., E. D. Penna. International Coal Mining Co. vs. Pennsylvania Railroad Company. Motion and affidavit for rule on defendant to produce certain papers and writings on the trial of the cause, and Order of Court. Newlin. Filed Feb. 19, 1906. Samuel Bell, Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Before Holland, J.

And now, February 28th, 1906, on motion of James W. M. Newlin, attorney for the plaintiff, the Court grants an additional rule on the defendant to show cause why the rule of February 19th, 1906, should not be amended by requiring the defendant to show cause why they should not be required to produce on the trial of this cause the papers and writings specified in the affidavit hereto attached, or to satisfy the Court why it is not in their power to do so, on Wednesday, March 7th, 1906, at 10 a. m.

By the Court:

Attest:

GEORGE BRODBECK, JR.,
Pro Clerk.

181 In the Circuit Court of the United States, for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

STATE OF PENNSYLVANIA,
City of Philadelphia, ss:

J. Chester Wilson, being further duly sworn according to law deposes and says that he is the secretary of the plaintiff the International Coal Mining Company, and that the Pennsylvania Railroad Company, the defendant in the above cause, has in its possession, power, custody and control, certain statements, claims, checks, drafts, vouchers and writings which contain evidence pertinent to the issue in the above case, that is to say:

3. Certain statements or claims in writing made by the plaintiff, the International Coal Mining Company, showing the shipments of coal set forth in the plaintiff's statement in this cause and the schedules attached thereto and claims presented by the said plaintiff in writing to the said defendant for rebates on freight paid to the Pennsylvania Railroad Company for said shipments, and drafts, checks or orders for money by means of which the said Pennsyl-

vania Railroad did pay to the plaintiff herein certain rebates on said freight charges, all being upon shipments of coal made by the said International Coal Mining Company and set forth in the said plaintiff's statement herein and the schedules attached thereto.

182 4. And the said affiant further avers that he has reason to believe and he verily believes that the Pennsylvania Railroad Company, the defendant in the above case, has in its possession, power, custody and control, certain statements, claims, receipts, checks drafts, vouchers and writings which contain evidence pertinent to the issue in the above case, that is to say:

Statements or claims in writing made by the Cresson & Clearfield Coal & Coke Company, showing shipments of coal made by the said corporation, between the first day of April, 1894, and the first day of April, 1901, by the lines of the defendant, the Pennsylvania Railroad Company, from initial points in Pennsylvania known as the Clearfield District to South Amboy, and to the various other points of delivery of the plaintiff's shipments of coal for the same period of time and between the same points as set forth in the schedules attached to the plaintiff's statement in this cause, the said points of delivery being without the State of Pennsylvania and in the States of New York, Massachusetts, Connecticut, New Jersey, Vermont, Delaware and Maryland; and all claims presented at any time by the said Cresson & Clearfield Coal and Coke Co. to the defendant, the Pennsylvania Railroad Company, for the payment by or for the Pennsylvania Railroad Co., to or for the Cresson & Clearfield Coal & Coke Co., of any sum or sums of money on account of previous payments to the Pennsylvania Railroad Co., for the said shipments of coal by way of the Pennsylvania Railroad Co., for the said corporation, the Cresson & Clearfield Coal & Coke Co., and also all drafts, checks or orders for money by means of which said payments were made by or on account of the Pennsylvania Railroad Co., to the said Cresson & Clearfield Coal & Coke Company, and all books of account containing accounts between the Pennsylvania Railroad Co. and the Cresson & Clearfield Coal & Coke Company for such payments or repayments or rebates on freight charges on such

183 coal so as aforesaid transported by the Pennsylvania Railroad Company and paid by the Pennsylvania Railroad Co., for or on account of the said Cresson & Clearfield Coal & Coke Co., or paid by any consignee of the said Cresson & Clearfield Coal & Coke Co., on account of the said carriage of coal for the Cresson & Clearfield Coal & Coke Company or its consignee or consignees.

5. The affiant asks that the replication filed by the International Coal Mining Company, the plaintiff, to the special plea of the Pennsylvania Railroad Company that this cause of action belongs to P. H. Walls, be taken as a part of this affidavit, and this affiant further asks that the said Pennsylvania Railroad Company be required to produce on the trial or show cause why, in answer to this rule, it cannot do so, all communications in writing by any officer or servant or by the counsel of the Pennsylvania Railroad Company, or by any officer or servant or by the counsel of the Cresson & Clearfield Coal & Coke Co., or the said P. H. Walls, and any writings of

any kind, including communications between different counsel of the Pennsylvania Railroad Company in this regard, and any writings showing the payments of money by or on account of the Pennsylvania Railroad Company to the said P. H. Walls or to the said Cresson and Clearfield Coal and Coke Company on account of their said judgment against the International Coal Mining Company, set forth in the defendant's special plea as aforesaid.

J. CHESTER WILSON.

Sworn to and subscribed before me this 23rd day of February, A. D. 1906.

[SEAL.]

FRANK R. BUCHANAN,
Notary Public.

Commission expires March 12, 1909.

(Endorsed: 69. April Sessions, 1904. C. C. U. S., E. D. 184 Penna. International Coal Mining Co. vs. Pennsylvania Railroad Company. Supplemental motion and affidavit for rule on defendant to produce certain papers and writings on the trial of the cause. Newlin. Filed Feb. 28, 1906. Samuel Bell, Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Defendant's Answer to Plaintiff's Rule to Show Cause Why Certain Papers and Writings Should not be Produced at Trial.

The above defendant, by its attorneys, Sellers & Rhoads, says that above rule should not be allowed in consequence of the plea of defendant filed in said suit setting up a Sheriff's sale of the plaintiff's assets and franchises during the pendency of the present suit, and consequent dissolution of plaintiff.

SELLERS & RHOADS,
For Defendant.

March 7, 1906.

(Endorsed: C. C. United States, E. D. of Pa. International Coal Mining Company vs. Pennsylvania Railroad Company. Defendant's answer to Plaintiff's Rule to show cause why certain papers and writings should not be produced at trial. Sellers & Rhoads, for Def't. Filed Mar. 7, 1906. Samuel Bell, Clerk.)

185 In the Circuit Court of the United States, for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

VS.

PENNSYLVANIA RAILROAD COMPANY.

SIR: Enter rule on plaintiff in above suit to show cause why the replications and amendments thereto filed therein should not be stricken off as scandalous, impertinent, immaterial and irrelevant.

Rule returnable March 14, 1906, at 10 a. m.

SELLERS & RHOADS,

Of Counsel for Defendant.

March 10, 1906.

To Clerk of the United States Circuit Court for the Eastern District of Pennsylvania.

(Endorsed:) 69. April Sess., 1904. C. C. U. S. International Coal Mining Company vs. Pennsylvania Railroad Company. Rule to show cause why replication should not be stricken off. Sellers & Rhoads, of counsel for defendant. Filed March 10, 1906. Samuel Bell, Clerk.

186 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

VS.

PENNSYLVANIA RAILROAD COMPANY.

And Now, March 16th, 1906, on motion of James W. M. Newlin, for plaintiff, leave is granted to withdraw the plaintiff's further replication filed March 6th, 1906.

JAMES B. HOLLAND, J.

(Endorsed: No. 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Co. vs. Pennsylvania Railroad Company. Leave to withdraw Replication filed March 6, 1906. Newlin. Filed Mar. 16, 1906. Samuel Bell, Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Replication.

And now, March 16th, 1906, the plaintiff, by its attorney, James W. M. Newlin, files the following replication by leave of Court:

187 1. The action is not barred by the Statute of Limitations.

2. The plaintiff replies to the further plea of the defendant that the plaintiff's said writ and declaration ought not to be quashed because the plaintiff says that it is not true that the plaintiff as a corporation has been dissolved and that its chartered rights, privileges and franchises including the franchise and right to be a corporation, together with all property, real, personal and mixed and all book accounts, claims, choses in action, causes in action, whether arising out of contracts, torts or penalties and assets of every description belonging to or in any way appertaining to the plaintiff, excepting only lands held in fee, were sold to one Patrick H. Walls on September 29, A. D. 1905, in a certain action at law in which the Cresson & Clearfield Coal & Coke Company was plaintiff and the plaintiff herein, the International Coal Mining Company, was defendant, pending in the Court of Common Pleas No. 1 for the County of Philadelphia, to June Term, 1901, number 3588, upon a writ of fieri facias.

3. The plaintiff replies to the said further plea of the defendant that on December 5, 1905, J. Chester Stauffer, a creditor of the plaintiff herein, the International Coal Mining Company, filed a petition in bankruptcy in the District Court of the United States for the Eastern District of Pennsylvania, being petition No. 2398, in which petition the said J. Chester Stauffer alleged inter alia as an act of bankruptcy the proceeding set forth in the defendant's further plea, and thereupon the Cresson & Clearfield Coal & Coke Company, a creditor of the plaintiff herein, the International Coal Mining Company, filed objections to the plaintiff being adjudged a bankrupt, which objections were the same as set forth in the defendant's further plea herein.

On February 21, 1906, the said District Court of the
188 United States for the Eastern District of Pennsylvania in Bankruptcy, overruled the objections to the adjudication made by the said Cresson & Clearfield Coal & Coke Company, and adjudged the plaintiff herein, the International Coal Mining Company, to be a bankrupt upon the ground that the said plaintiff had admitted in writing by its Board of Directors its inability to pay its

debts and willingness to be adjudged a bankrupt, and thereafter, on March 1st, 1906, the said Court in Bankruptcy allowed the said petitioning creditor to file an amended creditor's petition nunc pro tunc as of the 5th day of December, 1905, averring as follows, viz:

"Petitioner further avers that the International Coal Mining Company by the acts set forth in the original petition filed by your petitioner, committed an act of bankruptcy, to wit, on account of insolvency permitted a trustee to be appointed for its property and permitted a trustee to be put in charge of its property under the laws of the State of Pennsylvania, the same resulting by reason of a suit instituted in the Court of Common Pleas No. 1 of Philadelphia County, of June Term, 1901, No. 3588, in which proceedings the said Cresson & Clearfield Coal & Coke Company on the 12th day of October, 1901, obtained judgment for want of an affidavit of defense for the sum of Seven hundred and eighteen dollars and ninety-five cents (\$718.95), and on or about the 16th day of August, 1905, issued execution upon the said judgment under which said execution on or about the 29th day of September, 1905, the Sheriff of Philadelphia County, to wit, James L. Miles, Esquire, sold or attempted to sell the book accounts, choses in action, and other property of the said International Coal Mining Company and the said James

189 L. Miles, Esquire, High Sheriff, acted and is acting therein as trustee on account of the insolvency of the said International Coal Mining Company of the property of the said International Coal Mining Company, he the said Sheriff, acting thereunder under the laws of the State of Pennsylvania."

And this repliant further says that the acts set forth in the defendant's further plea constituted a proceeding by which the property of this plaintiff, an insolvent corporation, was placed in the hands of a receiver or trustee under a State Insolvency Statute, which was void under Section 3, sub-division 4 of the Bankruptcy Act, and for this reason no title passed to Patrick H. Walls under the Sheriff's sale set forth in the defendant's further plea.

4. The plaintiff further replies to the said further plea of the defendant that the aforesaid proceeding in bankruptcy is a plenary proceeding in rem, by which the said Cresson & Clearfield Coal & Coke Company and the said Patrick H. Walls and the defendant herein, the Pennsylvania Railroad Co. were charged with notice and thereby it is res adjudicata against the defendant, the Pennsylvania Railroad Company, that its plea of ownership of this suit in Patrick H. Walls is bad.

5. And this plaintiff further replies that the sale by the Sheriff set forth in the defendant's further plea constituted an act of bankruptcy and constituted a preference of a creditor, to wit, the Cresson & Clearfield Coal & Coke Company, and that Patrick H. Walls was its officer and bought for it and the preference thus obtained is void under the Bankruptcy Act.

6. And the plaintiff further replies that the proceedings set forth in the said defendant's further plea were had and were consummated by fraud and covin practiced by the said Cresson & Clearfield Coal

190 & Coke Company, and the said Patrick H. Walls, and the defendant herein, the Pennsylvania Railroad Company, and their servants and agents, for the purpose of fraudulently attempting to vest title in this suit in the said Patrick H. Walls for the benefit of the said Cresson & Clearfield Coal & Coke Company and the said defendant herein, the Pennsylvania Railroad Company, by using the said sale for their joint benefit in fraud of the rights of the plaintiff herein and of its creditors, and in contravention of the said Bankruptcy Act and in fraud of the rights of the plaintiff herein and of its creditors to have this asset of the plaintiff collected by proceeding with this suit against the Pennsylvania Railroad Company to recovery therein to the end that the said creditors of this plaintiff may have said asset administered in accordance with the terms of the said Bankrupt Act.

And this repliant further says that in order to carry out this unlawful scheme the said Sheriff's sale was not advertised according to law and the fact of the proposed sale was simply posted in the Sheriff's office, and in order to prevent persons being at the sale as purchasers the said posted notice fraudulently omitted therefrom any description of the property proposed to be sold and omitted any description of the causes in action attempted to be sold, and gave neither the terms or numbers nor named the courts in which said causes were pending, and omitted to give the amounts claimed by the plaintiff, the International Coal Mining Company, in said suits from the Pennsylvania Railroad Company, and this plan succeeded to the extent of enabling the said Patrick H. Walls to buy the same for forty dollars (\$40), from which costs of upwards of twenty-five dollars (\$25) were deducted, leaving less than fifteen dollars (\$15) to be divided amongst the creditors of the plaintiff herein, which creditors' claims exceed thirty-nine thousand dollars (\$39,000), and the claims of this plaintiff against the Pennsylvania Railroad Company in the plaintiff's said suits aggregate more than One hundred and seventy-three thousand dollars.

191

And this the plaintiff prays may be inquired of by the country.

JAMES W. N. NEWLIN,

For Plaintiff.

(Endorsed: 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Co. vs. Pennsylvania Railroad Company. Replication. Newlin. Filed, Mar. 16, 1906. Samuel Bell, Clerk.)

In the Circuit Court of the United States for the Eastern District
District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

The defendant demurs to the plaintiff's replication and assigns the following reasons therefor:

1. Because the plaintiff by its replication neither traverses the facts averred in the defendant's plea, nor admits and avoids the same, but merely takes issue as to the legal effect of these facts and as to the conclusion to be deduced or drawn therefrom.

2. Because the adjudication of bankruptcy set forth and referred to in said replication cannot have the effect of annulling or voiding the sale previously made of the franchises of the Plaintiff under the execution issued out of the Court of Common Pleas No. 1 for the County of Philadelphia.

192 3. Because the facts set forth in said replication affecting the regularity of the proceedings of said Court of Common Pleas No. 1 for the County of Philadelphia, which preceded the said sale of the franchises of the plaintiff, cannot be inquired of by this Court, but are exclusively for the consideration of said Court of Common Pleas No. 1 for the County of Philadelphia in a proceeding to set aside said sale.

Wherefore the defendant prays judgment.

THE PENNSYLVANIA RAILROAD COMPANY.
By SELLERS & RHOADS,
FRANCIS I. GOWEN, *Solicitors*.

Philadelphia, Pa., March 17th, 1906.

STATE OF PENNSYLVANIA,
City of Philadelphia, ss:

A. J. County, being duly sworn according to law, deposes and says:

I am the Assistant Secretary of the Pennsylvania Railroad Company, the defendant in this proceeding. The foregoing Demurrer is not interposed for delay.

A. J. COUNTY.

Sworn to and subscribed before me this 17th day of March, 1906.

LEWIS NEILSON,
Notary Public.

[SEAL.]

Commission expires 26 February, 1909.

(Endorsed: Circuit Court of the United States for Eastern District of Pennsylvania. No. 69. April Sessions, 1904. International Coal Mining Company vs. Pennsylvania Railroad Company. De-

murrer to Replication of Plaintiff. Sellers & Rhoads, Francis Gowen, for Def't. Filed Mar. 17, 1906. Samuel Bell, Clerk.)

193 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Answer to Rule to Produce Books and Papers.

The defendant, not waiving its right to object to the right of the plaintiff to obtain any order for the production of defendant's books and papers, due to the fact that this action has been abated by the dissolution of the plaintiff as the result of the sale of its franchises, as averred in the plea heretofore filed, but protesting that the plaintiff has no such right, answering the rule granted by this Court to show cause why certain papers and writings should not be produced upon the trial of the same, says:

1. It cannot produce the statements or claims referred to in paragraphs numbered 1 and 2 in the affidavit of J. Chester Wilson upon which said rule was granted, nor any of them. Nor the drafts, checks, or orders, nor any of them, also referred to in said paragraphs. Nor any books containing accounts such as are referred to in said paragraphs; its inability to produce all such being due to the fact that it has not in its possession any such statements, claims, drafts, checks, orders or books.

2. While not admitting that it has in its possession or can produce any of the writings and other papers referred to in paragraph 3 of said affidavit of J. Chester Wilson, it submits
194 that the plaintiff is not entitled to require it to produce the same.

THE PENNSYLVANIA RAILROAD COMPANY,
By JNO. P. GREEN, *Vice-President.*

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Lewis Neilson, being duly sworn according to law, deposes and says that he is the Secretary of the Pennsylvania Railroad Company, and that the facts set forth in foregoing Answer are true to the best of his knowledge and belief.

LEWIS NEILSON.

Sworn to and subscribed before me this 21st day of March, A. D. 1906.

JOHN F. CULIN,
Notary Public.

[SEAL.]

My commission expires Jan'y 19, 1907.

(Endorsed: Cir. Court U. S. E. D. of Penna. No. 69. April Sessions, 1904. International Coal Mining Company vs. Pennsylvania Railroad Company. Answer of Defendant to Rule to Produce Books and Papers. Sellers & Rhoads, for Def't. Filed Mar. 21, 1906. Samuel Bell, Clerk.)

195 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Enter rule on defendant to show cause why its additional plea filed October 25th, 1905, should not be stricken off because the same was not filed within four days after September 29th, 1905, and because the plea is not supported by affidavit or the showing of some probable matter to induce the Court to believe that the allegations in said dilatory plea are true. Returnable Wednesday, March 28th, 1906, at 10 a. m.

JAMES W. M. NEWLIN,
For Plaintiff.

March 24, 1906.

To Col. Samuel Bell, Clerk C. C. U. S.

(Endorsed: 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Co. vs. Pennsylvania Railroad Co. Rule to strike off plea of October 25th, 1905. James W. M. Newlin, for plaintiff. March 24, 1906. To Col. Samuel Bell, Clerk C. C. U. S. Filed Mar. 24, 1906. Samuel Bell, Clerk.)

196 In the Circuit Court of the United States, for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

To the Honorable the Judges of the said Court:

The petition of Edward D. McLoughlin respectfully shows:

That on February 21st 1906, upon a creditors' petition, No. 2398 in the United States District Court, Eastern District of Pennsylvania, the International Coal Mining Company was adjudged a bankrupt and that your petitioner has been duly elected Trustee in said bankruptcy proceedings and he asks leave to intervene in this cause so that he may prosecute the same for the benefit of the bankrupt estate.

And your petitioner will ever pray, &c.

EDW. D. McLOUGHLIN.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Edward D. McLoughlin, being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition are true.

EDW. D. McLOUGHLIN.

Sworn to and subscribed before me this 28th day of March, A. D. 1906.

JOHN STOCKBURGER,
Notary Public.

[SEAL.]

Commission expires Jan. 19th, 1907.

197 (Endorsed: 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Co. vs. Pennsylvania Railroad Company. Petition of Trustee in Bankruptcy to intervene. Newlin. Filed Mar. 29, 1906. Samuel Bell, Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
 vs.
 PENNSYLVANIA RAILROAD COMPANY.

April Sessions, 1905.

No. 25.

INTERNATIONAL COAL MINING COMPANY
 vs.
 PENNSYLVANIA RAILROAD COMPANY.

Demurrer to replication to special plea of October 7th, 1905, No. 25.

Demurrer to replication to special plea of October 25th, 1905, No. 69.

Rule to produce books and papers on the trial, No. 69.

Rule for attachment, No. 69.

Motion for continuance, No. 69.

HOLLAND, J.:

This motion for a continuance should be allowed for the following reason:

198 If the Circuit Court of Appeals in this District should hold that the bankruptcy proceedings cannot be sustained and that the sale and execution under the Pennsylvania Act of 1870 in effect

destroyed plaintiff's corporate existence, all proceedings had in a trial at this time may be null and void, and the determination of the demurrers to the replications above mentioned might depend upon what view the Court of Appeals takes of the matter now pending before them. The consideration and determination of them, therefore, should be postponed until the Court of Appeals passes upon the bankruptcy proceedings, and if that proceeding be sustained, these rules can then immediately be considered and properly disposed of.

Motion for continuance is, therefore, allowed, and all proceedings in the case be stayed until further order of this Court.

(Endorsed: No. 69. April Sessions, 1904. No. 25. April Sessions, 1905. International Coal Mining Co. vs. Pennsylvania Railroad Co. Order granting a continuance and staying proceedings until the further order of the Court. Filed Apr. 5, 1906. Samuel Bell, Clerk.)

199 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Further Replication to Defendant's Special Plea of Sheriff's Sale of the Cause of Action.

The plaintiff as to the plea specially above pleaded October 25, 1905, says, that since the last continuance in the United States Circuit Court of Appeals for the Third District, in the matter of the Appeal of the Cresson and Clearfield Coal and Coke Company, Creditor-Appellant, vs. J. Chester Stauffer, petitioning Creditor-Appellee, on Appeal from the Decree of the District Court for the Eastern District of Pennsylvania, sitting as a Court of Bankruptcy, in the matter of the International Coal Mining Company, cause number 2398, adjudicating February 21, 1906, the said corporation to be a bankrupt; the said Circuit Court of Appeals affirmed the judgment of the Court below and dismissed the Appeal and adjudged that the proceeding by the Cresson and Clearfield Coal and Coke Co., against the International Coal Mining Company, in the Court of Common Pleas No. 1, of Philadelphia County, to June Term, 1901, No. 3588, whereby it was attempted to sell this cause of action to P. H. Walls on September 29, 1905, for \$40, under a special writ of fi. fa. authorized by the said Court of Common Pleas No. 1, under the Pennsylvania Act of April 7, 1870, P. L. 58, was an act
200 of bankruptcy, and the proceedings thereunder were avoided by the filing within four months thereafter of the petition of J. Chester Stauffer, a creditor to have the said International Coal

Mining Company declared a bankrupt followed by an adjudication in bankruptcy on February 21, 1905, which adjudication was affirmed by the said United States Circuit Court of Appeals for the Third District, which adjudged inter alia that the said proceeding by special fi. fa. was an act of bankruptcy, in that thereby, because of insolvency, a receiver or trustee was put in charge of the bankrupt's property under the laws of a State.

This adjudication makes null and void the attempted sale of this cause of action to the said P. H. Walls, so as aforesaid set forth in the defendant's special plea above pleaded. The said Judgment of the Circuit Court of Appeals of the United States, was within its jurisdiction and is not subject to appeal and was binding on all the world and was binding particularly on the Cresson and Clearfield Coal and Coke Co., and upon P. H. Walls, and upon the defendant herein, the Pennsylvania R. R. Co. The plaintiff says that it was unable to pay the judgment of the Cresson and Clearfield Coal and Coke Co., because the plaintiff, the International Coal Mining Co., had been ruined and driven out of business by discrimination in freight charges practiced by the Pennsylvania Railroad Co., in part for the benefit of some persons connected with the Pennsylvania Railroad Co., and the said Cresson and Clearfield Coal and Coke Co., and the said P. H. Walls, who was an officer of the Cresson and Clearfield Coal and Coke Co., and the said Pennsylvania Railroad Co., in making the attempted sale of this cause of action, under the said special writ of fi. fa. were engaged in a conspiracy to cheat and defraud the plaintiff and the Pennsylvania Railroad Co. at the time of the attempted sale, was the real owner of the judgment of the Cresson and Clearfield Coal and Coke Co., and

201 said company filed its objection to the adjudication of the plaintiff to be a bankrupt for the benefit of the Pennsylvania Railroad Co., and prosecuted its appeal from the adjudication in bankruptcy to the Circuit Court of Appeals in bad faith and for the benefit of the said Pennsylvania Railroad Company as a part of the said conspiracy to cheat and defraud the plaintiff, to obstruct the administration of justice and to prevent the plaintiff and its creditors recovering from the Pennsylvania Railroad Co. the amounts due to the plaintiff by reason of the discriminating freight charges which ruined it and drove it out of business and into bankruptcy as aforesaid.

And the plaintiff therefore says as to the plea specially above pleaded that said execution and sale as set forth in said plea and the subsequent proceedings under said writ of execution constituted an act of bankruptcy on the part of the plaintiff herein, and therefore the said sale conveyed no title to the said Patrick H. Walls, who was a party to the fraudulent proceedings under which said sale was concocted and made. All of which the plaintiff is ready to verify.

JAMES W. M. NEWLIN,

For Plaintiff.

November 28, 1906.

(Endorsed: No. 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Co. vs. Pennsylvania Railroad

Co. Further replication to special plea. Enter rule on defendant to rejoin in fifteen days or judgment. James W. M. Newlin, for plaintiff. November 28, 1906. To Col. S. Bell, Clerk C. C. U. S. Filed Nov. 30, 1906. Samuel Bell, Clerk.)

No. 69.

202 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Demurrer of the Defendant to the Paper Filed by the Plaintiff Entitled "Further Replication to Defendant's Third Plea of Sheriff's Sale of the Cause of Action."

The defendant demurs to the said so-called further replication to its third plea, and assigns the following reasons therefor:

1. Because the said so-called replication has been filed without leave of the Court, and has been improperly filed, the plaintiff not having withdrawn a previous replication to which a demurrer is pending, as will appear from an inspection of the records of this Court.

2. Because the so-called replication states no fact, matter or thing, which would justify this Court in ignoring or disregarding the sale averred and set forth in said third plea of the defendant, and the consequent transfer to the purchaser, at such sale, of the claim which the plaintiff in this action is endeavoring to assert.

SELLERS & RHOADS,
Counsel for Defendant.

203 We do hereby certify that in our opinion this demurrer is well founded in point of law, and further, that the same is not interposed for purposes of delay.

SELLERS & RHOADS.

Lewis Neilson, being duly sworn according to law, deposes and says:

I am the secretary of The Pennsylvania Railroad Company, the defendant in this action. The foregoing demurrer is not interposed for purposes of delay.

LEWIS NEILSON.

Sworn and subscribed to before me this 12th day of December, A. D. 1906.

[SEAL.]

C. M. GREER,
Notary Public.

Commission expires January 19, 1907.

(Endorsed: 69. Apr. Sess., 1904. C. C. U. S. E. Dist. Pa. International Coal Mining Company v. P. R. R. Co. Demurrer to further replication to third plea. Sellers & Rhoads, for demurrer. Filed December 13, 1906. Samuel Bell, Clerk.)

204 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Before Holland, J.

And now, December 17, 1906, on motion of James W. M. Newlin, for plaintiff, the rules granted in affidavits of plaintiff February 19th and February 28th, 1906, to show cause why books and papers should not be produced by defendant, are withdrawn by leave of Court without prejudice.

By the Court:

Attest:

GEORGE BRODBECK, JR.,
Deputy Clerk.

(Endorsed: 69. April Sessions, 1904. C. C. U. S., E. D. Penna. International Coal Mining Company vs. Pennsylvania Railroad Co. Order for withdrawal without prejudice of rules to produce, etc., granted February 19th and February 28th, 1906. Filed Dec. 17, 1906. Samuel Bell, Clerk.)

205 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Second Further Replication Since the Last Continuance to Defendant's Special Plea of Sheriff's Sale of the Cause of Action.

The plaintiff and Edward D. McLoughlin, Esq., Trustee in Bankruptcy, of the plaintiff as an intervenor as to the defendant's special plea of the Sheriff's sale of the cause of action above pleaded without waiving the further replication since the last continuance heretofore filed to the said plea, say, that since the last continuance, to wit, on January 9th, 1907, the Auditor General and State Treasurer of Pennsylvania, in pursuance of law, superseded the re-settlements

of the tax account between the Commonwealth of Pennsylvania and the International Coal Mining Company, made October 9th, 1905, by which the taxes due to the Commonwealth on the capital stock of the International Coal Mining Company, for the years 1897 and 1898, were reduced from \$250 to \$10, which was paid by the said P. H. Walls, alleged purchaser at the Sheriff's sale of the said cause of action, so that he might obtain from the Auditor General a certificate that all taxes due by the International Coal Mining Company were then paid, which certificate was, and is by law a pre-requisite to the Sheriff's making a sale to the said P. H. Walls, of the
206 franchises and property of the International Coal Mining Company claimed by the defendant to have been made to him, the said P. H. Walls, for \$40.

And these repliants further say that the said P. H. Walls procured said re-settlement and reduction of taxation by fraud, practiced by the said P. H. Walls on the Commonwealth of Pennsylvania for the purpose of cheating the Commonwealth of Pennsylvania out of the balance of taxes due by the International Coal Mining Company, and for the further purposes of cheating the plaintiff herein, and its creditors, in the method set forth in the further replication since the last continuance heretofore filed herein.

And these repliants further say, that the said P. H. Walls, for this purpose falsely and fraudulently represented to the Auditor General and State Treasurer as a reason for making the said re-settlement of October 9th, 1905, that the capital stock of the International Coal Mining Company was worth only \$1,000, and in pursuance of the said fraudulent scheme the said P. H. Walls concealed from the Auditor General and State Treasurer the fact that a part of the assets of the International Coal Mining Co. then consisted of unpaid subscriptions on its capital stock due by at least one solvent stockholder to an amount at least equal to \$6,720, and further concealed from the Auditor General and State Treasurer the fact that he, the said P. H. Walls, was then claiming to be the owner by virtue of the said Sheriff's sale of this cause and of other causes in action and pending in this and other courts brought by the International Coal Mining Co., against the Pennsylvania Railroad Company, in which the plaintiff was seeking to recover upwards of \$176,060 for excessive and discriminating charges made by the Pennsylvania Railroad Co., in the transportation of the coal of the said International Coal Mining Co., and these repliants further say, that at the time of the Sheriff's sale and at the time of the alleged conveyance or transfer by the Sheriff, of the franchises and property of
207 the International Coal Mining Co., to the said P. H. Walls, there was still due and unpaid at least the sum of \$240, of taxes due to the Commonwealth of Pennsylvania by the International Coal Mining Co., and that the said Sheriff was then and there without authority to complete said alleged sale to the said P. H. Walls.

And these repliants further say, that the special fi. fa. set forth in the special plea of the defendant is now functus officii and that no further special fi. fa. can be issued under the judgment of the Cresson and Clearfield Coal and Coke Company above pleaded by

the defendant, because the International Coal Mining Company has been adjudged a bankrupt.

And repliants further say, that on October 4, 1905, the said P. H. Walls made an affidavit which was filed with the Auditor General and was in part the basis of the said resettlement of October 9, 1905, in which affidavit the said P. H. Walls averred that upon the judgment of the Cresson and Clearfield Coal and Coke Company against the International Coal Mining Co., a writ of fi. fa. had been issued October 24, 1903, and was returned nulla bona, and that the International Coal Mining Company was formerly a jobber in coal but has transacted no active business for over five years, and that it has been insolvent for many years.

Wherefore, these replicants say that the said Sheriff's sale so as aforesaid specially pleaded by the defendant conveyed no title to the said Patrick H. Walls to this cause of action. All of which these repliants pray may be inquired of by the country.

J. W. M. NEWLIN,
For Repliants.

January 21, 1907.

(Endorsed: No. 69. April Sessions, 1904. E. D. Penna. C. C. U. S. International Coal Mining Company vs. Pennsylvania Railroad Co. Second further replication to special plea. Enter rule on defendant to re-join in fifteen days or judgment. 208 James W. M. Newlin, for Repliants. January 21, 1907. Clerk C. C. U. S. Filed Jan. 21, 1907. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Before HOLLAND, J.

And now, January 30th, 1907, on the filing of the affidavit of J. Chester Wilson, Secretary of the plaintiff, the International Coal Mining Company, and on motion of James W. M. Newlin, attorney for the plaintiff, and for Edward D. McLoughlin, Esq., Trustee in Bankruptcy for plaintiff as an intervenor, the Court grant a rule on the defendant to show cause why it should not be required to produce on the trial of this cause the papers and writings specified in said affidavit or to satisfy the Court why it is not in its power to do so, returnable February 13th, 1907, at 10 a. m.

By the Court.

Attest:

GEORGE BRODBECK, JR.,
Deputy Clerk.

209 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
VS.
PENNSYLVANIA RAILROAD COMPANY.

1. J. Chester Wilson being duly sworn according to law deposes and says that he is the Secretary of the plaintiff, the International Coal Mining Company, and that the Pennsylvania Railroad Company, the defendant in the above cause, has in its possession, power and custody and control, certain statements, claims, receipts, checks, drafts, vouchers, books and other writings which contain evidence pertinent to the issue in the above case, and which it is necessary to have produced on the trial of the cause and which also it is necessary to have inspected in advance of trial if this can lawfully be done under the provisions of Section Seven hundred and twenty-four (724), of the Revised Statutes of the United States.

2. This documentary evidence shows that the plaintiff, the International Coal Mining Company, was discriminated against by the defendant, the Pennsylvania Railroad Company, for the benefit of the favored shippers named in the plaintiff's statement and for the benefit of other shippers in the circumstances set forth in the plaintiff's statement by the following methods:

a. By the payment of rebates during the continuance of the published rates then in existence.

210 b. Where in particular years, to wit: 1900 and 1901, in which the published rates were increased respectively 45c. and 55c per ton, certain favored shippers were allowed a rebate at least equalling the increase upon the ground that they were under contracts to deliver coal, which contracts called for the delivery at periods after the increase in the freight rate, which contracts are overlapping contracts. The plaintiff was forbidden to make such contracts and during the same period of time and in the same circumstances, the favored shippers, notably the Berwind-White Coal Mining Company and the Morrisdale Coal Co., and others, were allowed to make such contracts and did pay the higher rate of the new published tariffs and were repaid the increase and more than the increase by the defendant, the Pennsylvania Railroad Company.

Excluding the overlapping contracts the favored shippers were the Berwind-White Coal Mining Co. and affiliated companies and the Alexandria Coal Co., the Sterling Coal Co., W. H. Piper & Co., Morrisdale Coal Co., Loyal Hanna Coal and Coke Co., Keystone Coal & Coke Co., James L. Mitchell and Co., Mitchell Coal and Coke Co., Columbia Coal Co., David E. Williams, David E. Williams & Co., and others, and the Cresson and Clearfield Coal & Coke Company.

c. In the case of the Berwind-White Coal Mining Co., for the period covered by the plaintiff's statement, both as to dates of ship-

ment and initial and delivery points a discrimination was practiced against the plaintiff and in favor of the Berwind-White Coal Mining Co., in the following manner: The plaintiff in shipping coal to New York was obliged to ship to South Amboy, from which point it was taken by water into the harbor of New York. The defendant at the same time and in the same circumstances carried the coal of the

211 Berwind-White Coal Mining Co. to Harsimus Pier in the harbor of New York and gave to the Berwind-White Coal Mining Co. the exclusive use of Harsimus Pier for the purpose of enabling Berwind-White Coal Mining Co. to acquire a monopoly of the sale of steamship coal in the New York harbor. This result was accomplished because the exclusive use of Harsimus Pier and the handling of coal thereon was given to the Berwind-White Coal Mining Co. on such favorable terms that the plaintiff and others shipping to South Amboy could not deliver coal in New York harbor and even got their money back and no profit at the price fixed by Berwind-White Coal Mining Company for the delivery of coal in New York harbor, at which price the Berwind-White Coal Mining Co. made a very large profit. All the documentary evidence showing this transaction is now in the possession of the defendant, the Pennsylvania Railroad Co., and officers and agents of the Pennsylvania Railroad Co., and the officers and agents of the Berwind-White Coal Mining Co., were within a year of this time examined before the Interstate Commerce Commission in this very transaction, and the documentary evidence showing the details thereof was then and there secured by the Interstate Commerce Commission from the defendant and its officers and agents, and from the officers and agents of the Berwind-White Coal Mining Co.

3. As to rebates and allowances set forth in paragraph two, subdivisions *a* and *b*, the method of obtaining rebates was as follows:

From time to time, generally monthly, the shipper presented a statement to the Railroad Company setting forth its shipments in detail, giving car numbers, numbers of tons carried and shipping points, and sometimes claiming a fixed rebate and at other times leaving that to be settled by a bargain made from time to

212 time with J. G. Searles, Coal Freight Agent of the Pennsylvania Railroad Company, and Oscar Knipe, Auditor of Freight Receipts. At the time these statements of the shippers were handed in the Railroad Company had already in its own possession the same information, and clerks of the Railroad Company who compared the shipper's statement with the Railroad Company's own accounts, and if they agreed or were made to agree by mutual adjustment, the auditor of coal freight receipts fixed the amount of the rebate and the same was paid by check to J. G. Searles, coal freight agent. A part of the documentary evidence consisted of letters from the coal freight agent's department to the department of the auditor of coal freight receipts, of which press copies were kept which accompanied the statements to the accounting department and the coal freight agent's department also kept a press copy of a memorandum of a slip that accompanied a check for the rebate when it was sent to the shipper, and the entire transaction was evidenced by book or books and other writings, and the check was

drawn for the amount appearing on these books and writings and was signed by either the Auditor of coal freight receipts, or by some other person for the Railroad Company and then was countersigned by J. G. Searles, coal freight agent, and was then given to the shipper, who ever he was. In this matter in addition to the statements of shipments made by the shipper to the Railroad Company and the statements in the hands of the Railroad Company, the rebates paid were evidenced by other documentary proof.

a. The written communications between the coal freight agent and the Auditor of coal freight receipts, copies of which are kept in letter books.

b. The checks for the rebates paid to shippers. These were countersigned by the comptroller, the auditor of coal freight receipts and the coal freight agent and each of these departments kept

213 a permanent record of these checks which came back to the

Railroad Company and the stubs of the check books furnished further information in regard thereto so that the transactions can all be traced through documentary evidence in the hands of the defendant, the Pennsylvania Railroad Company.

4. In the case of the International Coal Mining Company vs. the Pennsylvania Railroad Company in the Court of Common Pleas No. 2, of Philadelphia County, March Term, 1901, No. 362, which was tried before Judge Wiltbank in October, 1904, the rebate papers similar to the above mentioned extending back to April 1, 1898, were produced on trial by the Railroad Co.

This was used to recover overpaid freight charges on shipments made within the State of Pennsylvania and the documentary evidence was precisely as hereinbefore detailed and this evidence showed the payment of rebates to David E. Williams & Co., on shipments in April, May, June, and July, 1900, and April, 1898, to March 31, 1899, and April, May and June, 1899, and to Berwind-White Coal Mining Co., in April, May, June and July of 1899, and April, May and June, July and August, 1900, and to the Sterling Coal Co. March 31, 1899, and April, 1899, to April, 1900, and to the Loyal Hanna Coal and Coke Company April 9, to November 30th, 1898, April 1, 1899 to January 31, 1900, and in February and March, 1900, and to the Morrisdale Coal Company April, 1898, to March 31, 1899, and in April and May, 1899, and June and July, 1899, and July, August and September and December, 1899, and May, April, June and July, 1900.

In the said suit in the Court of Common Pleas No. 2, of Philadelphia County, the evidence shows that the shipments made by the above named shippers who got rebates were made between the

214 same points within the State of Pennsylvania as the shipments made by the International Coal Mining Co., the subject of the said litigation and the evidence thus produced is in point of time of shipments covered by the plaintiff's statement in this present cause now pending in this Honorable Court, and the affiant avers, that during the same periods of time covered by the claims of the International Coal Mining Company, in this suit now pending in this Honorable Court, the above-named other shippers did receive

rebates from the Pennsylvania Railroad Company on interstate shipments between the same points as the plaintiff's shipments and that these shippers did present similar claims and had made to them allowances by the Pennsylvania Railroad Company similar to those proven by the documentary evidence produced on call by the said Railroad Company on the trial before Judge Wiltbank, in October, 1904, and the plaintiff's claim in this suit is in this Honorable Court to October Sessions 1904, No. 69. The affiant further says that the Pennsylvania Railroad Company has in its possession the documentary evidence showing the payment of said rebates to said shippers as herein before mentioned as to the said interstate shipments made by the same favored shippers (and others) between the same points and at the same time as the plaintiff's shipments for which it was overcharged as set forth in the plaintiff's statement in this cause.

J. CHESTER WILSON.

Sworn to and subscribed by said J. Chester Wilson this 24th day of January, 1907.

[SEAL.]

FRANK R. BUCHANAN,

Notary Public.

Commission expires March 12th, 1909.

(Endorsed: 69 April Sessions 1904. C. C. U. S. E. D. Penna. International Coal Mining Co. vs. Pennsylvania Railroad Co. 215 Rule on defendant for production of papers, etc., on trial Retble. February 13th, 1907. Filed Jan. 30, 1907. Henry B. Robb, Clerk. By L., Deputy Clerk. Newlin.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

The defendant demurs to the so-called second further replication to its special plea, filed in the above-entitled cause on the 21st day of January, A. D. 1907, and assigns the following reasons, therefor:

1. Because the so-called replication states no fact, matter or thing which would justify this court in ignoring or disregarding the sale averred and set forth in said third plea of the defendant, and the consequent transfer to the purchaser, at such sale, of the claim which the plaintiff in this action is endeavoring to assert.

SELLERS & RHOADS,

Counsel for Defendant.

We do hereby certify that, in our opinion, this demurrer is well founded in point of law, and further, that the same is not interposed for purposes of delay.

SELLERS & RHOADS.

216 Lewis Neilson, being duly sworn according to law, deposes and says: I am the secretary of the Pennsylvania Railroad Company, the defendant in this action. The foregoing demurrer is not interposed for purposes of delay.

LEWIS NEILSON.

Sworn and subscribed to before me this 31st day of January, A. D. 1907.

[SEAL.]

A. J. COUNTY,
Notary Public.

Commission expires January 21st, 1909.

(Endorsed: 69 April Session 1904. C. C. U. S. E. D. Penna. International Coal Mining Co. vs. P. R. R. Co. Demurrer to second further replication Filed Feb. 1, 1907. Henry B. Robb, Clerk, By L., Deputy Clerk. Sellers & Rhoads, for Deft.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Sur rule on defendant, granted January 30th, 1907, to show cause why it should not be required to produce upon the trial certain papers and writings.

The Pennsylvania Railroad Company, the defendant in the above-entitled action, answering the rule to show cause why it
217 should not produce, upon the trial of the case, certain papers and writings, says:

1. It respectfully suggests to the Court that the plaintiff is not entitled to the order sought by it because of the facts averred and set forth in the third plea filed by this respondent.

2. It suggests, and respectfully submits to the Court, that no warrant exists, under the statutes of the United States, for the making of any such order as is sought by the plaintiff in an action of the character of the present one, which is an action to recover damages in the nature of penalties claimed to be due because of alleged violations of the Acts of Congress known as the Interstate Commerce Acts.

THE PENNSYLVANIA RAILROAD COMPANY,
By JNO. P. GREEN, *Vice President.*

STATE OF PENNSYLVANIA.

City and County of Philadelphia, ss:

Lewis Neilson, being duly sworn, deposes and says that he is the secretary of The Pennsylvania Railroad Company, the defendant above-named, and that he is advised by counsel that the averments of the above answer are true.

LEWIS NEILSON.

Sworn and subscribed before me this 12th day of February, A. D. 1907.

[SEAL.]

C. M. GREEN,
Notary Public.

Commission expires January 19th, 1911.

(Endorsed: 69 April Session 1904. C. C. U. S. E. D. Penna. International Coal Mining Co. vs. P. R. R. Co. Answer to rule to produce papers, etc., at trial. Filed February 13th, 1907. Henry B. Robb, Clerk. Sellers & Rhoads, for Deft.)

218 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Overruling Demurrer to Replication.

HOLLAND, J.:

In this case suit was brought July 29th, 1904, to the April Sessions of that year. Statement of claim filed to which the defendant pleaded October 25th, 1905, to which plea a replication was filed March 16th, 1906, and to this the defendant demurred.

For the reasons stated in the opinion filed this day in the case of International Coal Mining Co. vs. Pennsylvania Railroad Co., No. 25 April Sessions 1905, the demurrer is overruled.

(Endorsed: No. 69. April Sessions, 1904. C. C. U. S. International Coal Mining Co. vs. Pennsylvania Railroad Co. Opinion of Court overruling demurrer to replication. Filed Mar. 4, 1907. Henry B. Robb, Clerk, By B., Deputy Clerk.)

219 "Copy of Opinion."

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1905.

No. 25.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Overruling Demurrer to Replication.

HOLLAND, J.:

This suit was instituted May 13th, 1905, for damages resulting in an unlawful discrimination against the plaintiff by the defendant in the shipment of coal over the latter's road.

On July 11th, 1905, the defendant pleaded not guilty and the statute of limitations.

On October 7th, 1905, by leave of Court, the further plea was filed, as follows:

"And for a further plea in this behalf the defendant, by leave of Court, says that the plaintiff ought not to have or maintain its said action, because, since the institution of the same, to wit, on September 29th, A. D. 1905, in a certain action at law, in which the Cresson & Clearfield Coal and Coke Company was plaintiff, and the plaintiff herein, the International Coal Mining Company, was defendant, pending in the Court of Common Pleas No. 1, for the County of Philadelphia, to No. 3588 June Term, 1901, of which said action the said Court of Common Pleas had jurisdiction, there duly issued, upon a judgment obtained therein by the plaintiff against the defendant, a writ of Fieri Facias, under and by virtue of which the Sheriff of the County Philadelphia duly and lawfully exposed

to public sale or vendue on said September 29th, 1905, all
220 and singular the chartered rights, privileges and franchises of the said International Coal Mining Company, plaintiff herein, including the franchises and right to be a corporation, together with all property, real, personal and mixed, and all book accounts, claims, choses in action, causes in action, whether arising out of contracts, torts or penalties, and assets of every description, belonging to, or in any way appertaining to said International Coal Mining Company, plaintiff herein, excepting only lands in fee, and thereupon sold the same to one Patrick H. Walls, all of which appears upon the records of the said Court of Common Pleas No. 1 for the County of Philadelphia, as will appear by an inspection of the same."

To the latter plea, the plaintiff replied, March 13th, 1906, that no title to the suit in question passed to Patrick H. Walls under the Sheriff's sale set forth in the plea, because subsequent to the sale but within four months thereafter, the plaintiff corporation had been adjudged a bankrupt, and Edward D. McLoughlin appointed trustee in bankruptcy, who had, with leave of court, intervened as plaintiff in this suit and is entitled to prosecute the same to judgment for the benefit of the creditors of the bankrupt estate. There were other matters set forth in this replication, which need not now be considered.

The defendant, on March 17th, 1906, demurred to the plaintiff's replication and assigned the following reasons therefor:

"1. Because the plaintiff by its replication neither traverses the facts averred in the defendant's plea nor admits and avoids the same, but merely takes issue as to the legal effect of these facts and as to the conclusion to be deduced or drawn therefrom.

"2. Because the adjudication of bankruptcy set forth and referred to in said replication cannot have the effect of annulling or voiding the sale previously made of the franchises of the
221 plaintiff under the execution issued out of the Court of Common Pleas No. 1 for the County of Philadelphia.

"3. Because the facts set forth in said replication affecting the

regularity of the proceedings of said Court of Common Pleas No. 1 for the County of Philadelphia, which preceded the said sale of the franchises of the plaintiff, cannot be inquired of by this Court but are exclusively for the consideration of said Court of Common Pleas No. 1 for the County of Philadelphia in a proceeding to set aside said sale."

This demurrer, technically speaking, raises the question as to whether whatever right or title Patrick H. Walls took to the claim in suit under the Sheriff's sale was destroyed by reason of the bankruptcy proceedings. This question need not be considered because in our judgment Patrick H. Walls acquired no interest whatever in this claim by virtue of the Sheriff's sale.

The procedure mentioned in the above plea, under which the property was sold, was instituted under the Pennsylvania Act of March 7th, 1870 P. L. 58. This Act authorizes "the sheriff" or other officer to levy the amount of the judgment, with interest and costs of suit, on "any personal, mixed or real property, franchises and rights of such corporation and thereupon proceed and sell the same." There is nothing in this Act which authorizes the sale of a "claim for damages" such as is involved in this suit. In fact we do not think this kind of a claim or choses in action can be sold under this proceeding, and we are sustained in this view of the case by the Supreme Court of the State of Pennsylvania in the case of Hogg's Appeal, 88 Pa. St., 195-197. In that case it was urged upon the Court that "the unpaid subscriptions to the stock of the company passed to the purchaser at Sheriff's sale by virtue of the sale of the road and its franchises, free from any and all claims that the delinquent subscribers might have against the company." The

222 Court, in a per curiam opinion, held otherwise, and said "The sale of the railroad property and franchises did not pass to the purchaser the debts or mere choses in action due to the company from others."

And again, so late as April 9th, 1906, the Supreme Court of the State of Pennsylvania, in an opinion filed by Justice Mestrezat in Pocono Ice Co., vs. American Ice Co., 214 Pa. St., 640, holds that the sale of the property and franchises of a corporation does not dissolve or extinguish the existence of mining, manufacturing and trading companies since the Pennsylvania Act of May 21st, 1881, P. L. 30, which expressly provides that "all corporations for mining, manufacturing or trading purposes whose charters may have expired, or may hereafter expire, may bring suit and maintain and defend suits already brought for the protection and possession of their property and the collection of debts and obligations owing to them or any of them, and sell, convey and dispose of their property, and make title therefor as fully, and effectually as if the charter had not expired." The Act authorizes the officers last elected to represent the corporation for such purpose, and declares that its purpose is to enable the corporation "to realize and divide their assets and wind up their affairs." The Court holding the Act applies to corporations whose property and franchises have been sold on execution, and although the property and franchises of the Pocono Company had

been sold, it existed for the purpose of instituting suit against The American Ice Company to recover damages for breach of contract. The plaintiff did recover the judgment, and it was sustained.

The case in effect, therefore, holds that a claim, such as the one in the suit at bar, did not pass to the purchaser at the Sheriff's sale of the property and franchises of the International Coal Mining Company on an execution against it. But whether or not the

International Coal Mining Company could have maintained
223 this suit after the Sheriff's sale of its property and franchises on an execution authorized by the Act of May 7th, 1870, as an existing corporation, kept alive by virtue of the Act of May 21st, 1881, as suggested by, the decision of the Supreme Court in the Pocono case vs. American Ice Co., supra, we need not consider because it has been settled by the State Court. This Court has held that the International Coal Mining Company was not dissolved by the Sheriff's sale, and on the involuntary petition properly adjudged a bankrupt. In re International Coal Mining Co., 143 Fed. Rep., 665. This decision has been affirmed by the Circuit Court of Appeals in this District in the case of Cresson & Clearfield Coal and Coke Co., vs. Stauffer, 148 Fed. Rep., 981. Edward D. McLoughlin, trustee in bankruptcy, has, with leave of Court, intervened and is the present plaintiff claiming the right to prosecute this suit to judgment.

Following the view taken by the Court of last resort in the State of Pennsylvania, we hold that title to the claim involved in this suit did not pass to Patrick H. Walls by virtue of the Sheriff's sale set forth in the special plea of the defendant, and that the trustee in bankruptcy properly appears as the plaintiff in this case. The demurrer to the replication is overruled.

(Endorsed: No. 25. April Sessions 1905. C. C. U. S. International Coal Mining Co., vs. Pennsylvania Railroad Co. Opinion of Court overruling demurrer to replication. Filed Mar. 4, 1907. Henry B. Robb, Clerk. By B., Deputy Clerk.)

224 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

And now this eleventh day of March, A. D. 1907, the defendant, by leave of the Court, files the following rejoinder to the plaintiff's replication:

The defendant says that the matters pleaded and set forth in the plaintiff's replication do not entitle the plaintiff to maintain this action, because it says that while it is true that certain proceedings have been had in the District Court of the United States for the Eastern District of Pennsylvania, in which an adjudication of bank-

ruptcy was made against the plaintiff in the present action, viz., the International Coal Mining Company, such adjudication did not avoid or annul the sale which had been made previous to such adjudication by the Court of Common Pleas No. 1 of the County of Philadelphia as averred and set forth in the plaintiff's third plea, because of the fact that said sale had been made prior to the adjudication of bankruptcy and before the institution of the proceeding which resulted in the making of the said adjudication. And the defendant denies that the said sale made by the Court of Common Pleas No. 1 was brought about by or through any fraudulent combination or conspiracy between this defendant, its officers, agents, or legal representatives and the plaintiff in the action in the said Court of Common Pleas No. 1 of Philadelphia County, in which said sale was made, or its officers, agents, or legal representatives, and
225 denies every and all allegations in this respect contained and set forth in the plaintiff's replications; and it avers that the said sale was regularly made, and that the effect thereof was to pass title to the purchaser thereat, P. H. Walls, to the claim which the plaintiff in the present action is endeavoring to maintain and assert, because of the following order made by the said Court and of the subsequent proceedings in conformity therewith and in consummation thereof:

"And now, this 16th day of August, 1905, the Court, upon consideration of the foregoing petition asking for the issuance of a Special Writ of Fieri Facias, do order and direct the Sheriff to levy upon and to sell all and singular the chartered rights, privileges and franchises of the said International Coal Mining Company, including the franchise right to be a corporation, together with all property, real, personal and mixed, and all book accounts, claims, choses in action, causes in action arising out of contracts, torts or penalties and assets of every description, belonging to, or in any way appertaining to, said International Coal Mining Company, excepting only lands held in fee, as provided by Section 1 of the Act of April 7th, 1870."

And this defendant says that the International Coal Mining Company, the plaintiff in the present action, after the said recited order had been made by the Court of Common Pleas No. 1, filed a petition in said court praying that the sale ordered by said court should be set aside and the writ of execution, which had issued pursuant to said order should be set aside, alleging that the effect of a sale under the said writ of execution would be a sacrifice of the claim of the International Coal Mining Company against the defendant in the present action; and neither in said petition, or in any other way, did the plaintiff in the present action seek to have the said sale enjoined or stayed because it was being brought about, or carried through, as the result of any fraudulent combination or con-
226 spiracy, nor because there was to be included therein the choses in action and causes in action arising out of contracts, torts or penalties of the plaintiff in the present action, the International Coal Mining Company.

And the defendant further says that the plaintiff ought not to

have or maintain its said action, because it says that after the said sale of the choses in action and causes in action had been duly made pursuant to the process of the said Court of Common Pleas No. 1 of Philadelphia County and all proceedings regularly and duly had necessary to vest in the purchaser at said sale, P. H. Walls' title to the same, so that the said purchaser had become entitled to assert and maintain any claims or causes in action, whether arising out of contracts, torts or penalties which had theretofore belonged to, or in any way pertained to, the said International Coal Mining Company, this defendant, relying upon the proceedings had in the said Court of Common Pleas No. 1 of Philadelphia County, and upon the title which had been thereby acquired by the said P. H. Walls, as aforesaid, paid to the said P. H. Walls the sum of nine hundred and fifty-three 95/100 dollars in full satisfaction, adjustment and accord of any and every claim or demand which the plaintiff herein, the said International Coal Mining Company, had against this defendant, including therein the claim or cause of action which the said plaintiff in the present action is endeavoring to assert and maintain.

Wherefore, this defendant says that the said plaintiff is not entitled to maintain its action, and prays judgment accordingly.

SELLERS & RHOADS,
FRANCIS I. GOWEN,

Counsel for Defendant.

(Endorsed: In the Circuit Court of the United States for the Eastern District of Pennsylvania. No. 69. April Sessions, 1904.

International Coal Mining Company vs. The Pennsylvania 227 Railroad Company. Rejoinder of The Pennsylvania Railroad Company to Plaintiff's Replication. Before Holland, J. And now, to wit, this 11th day of March, 1907, it is ordered that leave be granted to file the within rejoinder of the Penna. R. R. Co. to plaintiff's replication. By the Court. Attest: George Brodbeck, Jr., Deputy Clerk. Filed Mar. 11, 1907. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

And now March 11, 1907, the plaintiff moves to strike off the rejoinder of the defendant this day filed by leave of Court because it appears of record that the said rejoinder is a sham pleading.

JAMES W. M. NEWLIN,

For Plaintiff.

To Cl'k C. C. U. S.

(Endorsed: No. 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Company vs. Pennsylvania Railroad Company. Motion to strike off rejoinder. Newlin. Filed Mar. 12, 1907. Henry B. Robb, Clerk. By L., Deputy Clerk.)

228 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

VS.

PENNSYLVANIA RAILROAD COMPANY.

Order to Produce Books and Papers.

HOLLAND, J.:

A petition was presented January 30th, 1907, and a rule granted on the defendant to show cause why the books and papers set forth in the petition and statement should not be produced at the trial of the cause.

The defendant makes answer: (1st) That it should not be required to produce these books and papers because of facts averred and set forth in the third plea filed; (2nd) That the action being one for the recovery of damages in the nature of a penalty under the Interstate Commerce Act, the motion should be denied.

The first question, which raises the right of the plaintiff to continue the suit, has been decided against the defendant in an opinion filed March 4th, 1907.

As to the second, we think that has practically been disposed of by Hale vs. Henkel, 201 U. S., 43. In that case a subpoena duces tecum was served upon the witness Hale to produce certain books and papers belonging to certain corporations. The witness refused to produce the books, for the reason, among others, that the production of the books would incriminate the corporations. In the court below the objection was overruled and the witness required to produce the books. This view was sustained by the Supreme Court in an elaborate opinion by Judge Brown, on page 74 of which he uses the following language:

"If, whenever an officer or employé of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers. Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that there is a clear distinction in this particular between an individual and a corporation, and that the latter

has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the State, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate him, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights.

230 "Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation, which is charged with a criminal violation of the statute, may plead the criminality of such corporation as a refusal to produce its books. To state this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges."

The Government was investigating the actions of certain corporations for a violation of the Sherman Act to protect trade and commerce against unlawful restraints and monopolies, and the Court said that a corporation "has no right to refuse (in such case) to submit its books and papers for examination at the suit of the State," but the principle is the same when there is an application for the production of books at the suit of an individual who
231 claims to have been injured by a violation of the Interstate Commerce Act. The corporation cannot refuse to produce its books in a claim for damages resulting from a violation of this Act. *Nelson vs. U. S.*, 201 U. S., 92, to the same effect.

The plaintiff in this case is entitled to the production of such books and papers as are relevant and pertinent to the issues involved, but the Court will not make the rule absolute, as the question of

the relevancy of whatever books and papers are called for must be passed upon at the trial. *Bas. vs. Steele*, Fed. Cases No. 1088; 3rd Wash. C. C., 381; *Dunham vs. Riley*, Fed. Cases No. 4155; 4th Wash. C. C., 126; *Iasigi vs. Brown*, Fed. Cases No. 6993; 1 Curt., 401; *Cassett et al. vs. Mitchell Coal & Coke Co.*, decided in this circuit and not yet reported.

It is ordered, therefore, that the defendant be required to produce the books and papers specified in the petition at the trial of the cause, unless it shows cause at the trial why the same should not be produced.

(Endorsed: No. 69. April Sessions, 1904. International Coal Mining Co. vs. Pennsylvania Railroad Co. Opinion of Court requiring defendant to produce books and papers at the trial of the case. Filed Mar. 25, 1907. Henry B. Robb, Clerk. By L., Deputy Clerk.)

232 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

And now, this 27th day of March, A. D. 1907, the defendant moves the Court to grant a rule to show cause why the plaintiff should not be required to furnish a bill of particulars which should disclose the following information as to the shipments which the plaintiff claims to have made, and in respect to which it claims to recover damages because of alleged overcharges:

1. Date of each shipment made.
2. Point of origin of each shipment.
3. Destination of each shipment.
4. Number of tons of coal embraced in each shipment.
5. Net rate of freight paid on each shipment.
6. Names of consignors and consignees of each shipment.

SELLERS & RHOADS,
FRANCIS I. GOWEN,

Counsel for Defendant.

233 STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Lewis Neilson, being duly sworn according to law, deposes and says, that he is the Secretary of The Pennsylvania Railroad Company, the defendant in the above action, and that he is advised by counsel, and therefore suggests to the Court, that the defendant is entitled to require the plaintiff to furnish the information which the

said defendant desires to secure from the bill of particulars above mentioned.

LEWIS NEILSON.

Sworn and subscribed to before me this 27th day of March, A. D. 1907.

C. M. GREER,
Notary Public.

[SEAL.]

Commission expires January 19th, 1911.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Before Buffington, J.

And now, this twenty-seventh day of March, A. D. 1907, upon consideration of the foregoing motion, the Court grants a rule upon the plaintiff returnable the 29th instant, to show cause why it
234 should not furnish the bill of particulars in respect to shipments embraced in this action disclosing the information concerning the same which the defendant prays for.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Endorsed: U. S. C. C. E. D. of Pa. 69. Apr'l S., 1904. International Coal Mining Co. vs. Pennsylvania R. Co. Affidavit and Order granting rule to show cause why plaintiff should not file a Bill of Particulars. Filed Mar. 27, 1907. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

To the Honorable the Judges of the said Court:

The petition of Edward D. McLoughlin, Trustee in Bankruptcy of the International Coal Mining Company, an intervening plaintiff, respectfully shows:

1. That this Honorable Court in an opinion filed herein on March 25th, 1907, on plaintiff's motion to make absolute the rule
235 granted January 30, 1907, to produce on the trial the books and papers set forth in the petition and statement upon which the said rule was granted made the following order:

"It is ordered, therefore, that the defendant be required to produce the books and papers specified in the petition at the trial of the cause, unless it shows cause at the trial why the same should not be produced."

2. Your petitioner further shows that it is well settled that no judgment by default can be taken at the trial for failure to produce books and papers under Section 724 of the Revised Statutes of the United States, unless prior to the said trial the Court shall have positively ordered the production of the books and papers and that it is not within the power of the Court on the trial to make an order for the then present production of books and papers under said Section 724 of the Revised Statutes of the United States and then upon the said trial on refusal or neglect to produce books and papers impose the penalty of a judgment by default for failure to produce under said Statute, and hence if the words "unless it show cause at the trial why the same should not be produced," are not stricken out of the order of this Honorable Court, made March 25, 1907, the defendant may destroy the effect of the Statute by raising any question however trivial, and then upon the Court dismissing the objection and then positively ordering the production of books and papers the defendant may stand mute and neither produce nor decline to produce, and having reached this point it will not be possible for the Court to enter judgment by default under the said Section for non-production of the books and papers then ordered to be produced.

The position of the plaintiff will then be this, it must either go on or stop; if it goes on it must abandon all benefit of the rule to produce and the order made thereunder, and must proceed
236 without regard thereto as if no rule to produce had been granted and as if no order had been made thereunder. The plaintiff's position so far as books and papers in the possession of the defendant is concerned, would be that the plaintiff would be required to offer secondary evidence of original papers pertinent to the issue in the possession of the defendant which the defendant refuses to produce. In the nature of things there can be no secondary evidence of papers furnished, because they are in the possession of the defendant and because of recent decision of the Circuit Court of Appeals in the case of the Mitchell Coal & Coke Company no inspection in advance of trial can be had under Revised Statutes, Section 724. Furthermore, the plaintiff cannot simultaneously with a rule to produce under Section 724, issue subpoenas duces tecum to the officers of the defendant to produce books and papers because such subpoena might be held to be a waiver of the proceeding by rule to produce under Section 724 and the very object of Section 724 is to provide a better remedy than a duces tecum can afford, because of this very impossibility of obtaining secondary evidence of the original papers in the possession of the defendant and pertinent to the issue. The

only other cause open would be upon the above contingency arriving for the trial Judge with the case actually before a jury to adjourn the consideration of the case until a fixed day and at the same time make an order to produce by such fixed day, upon which the jury would return and the case would be resumed for trial and at that future time possibly there would have to be one or more other adjournments upon the defendant raising more points as reason for non-production, and so the delays could continue indefinitely and the trial be absolutely prevented.

3. Your petitioner charges that there is sufficient evidence now of record in this case to make it clear that such is the intention of the defendant and that it will abuse the opportunity which
237 would be within its power, unless this order is modified as within prayed.

4. In this connection your petitioner calls the attention of the Court not only to the consideration of the persistent abuse of the claim of a Sheriff's sale to Walls, but further calls attention to the fact that on a former rule to produce books and papers in this cause, an answer was filed raising certain alleged questions of law and in addition thereto claiming that the defendant did not have in its possession certain books and papers mentioned in a former petition filed when the plaintiff had less accurate information than was in its possession when the rule to produce of January 30, 1907, was granted.

Your petitioner now calls the attention of the Court to the case of Owyhee L. & I. Company vs. Tautphaus, 109 Federal Reporter, 547, (1901). In this case the Circuit Court of Appeals determined that the trial court could not, under Section 724, on the trial, make an order for the production of books and papers and then presently enter judgment by default under Section 724 for failure to produce, but that the order to produce must be a positive one and made before the trial so as to give the defendant or plaintiff, as the case might be, an opportunity to be ready to comply with the order at the trial. In this case the Circuit Court made the order to produce on the trial and entered judgment by default thereafter on the same trial for failure to produce the books and papers for which reason the judgment by default in the court below was reversed by the Circuit Court of Appeals.

The attention of the Court is further called to the case of Bass vs. Steele (1818), 2 Federal Cases No. 1088 and 3 Washington C. C., page 381. In this case it was distinctly decided that the plaintiff requiring the production of papers on the trial as a means to obtain a judgment by default under the fifteenth section of the Judiciary Act—now R. S. 724, is bound to give the opposite party
238 notice that he shall move the Court for an order upon him to produce the papers; or on failure to do so will ask the Court to award judgment by default against the defendant under the terms of the said Section 724. This decision by itself makes it impossible to get judgment by default on a trial where the order to produce is only made absolute at the trial.

Your petitioner further calls the attention of the Court to these facts:

1. The petition for the rule to produce set forth in detail the books and papers called for.

2. It alleged that they were pertinent to the issue.

3. Their description shows that they were pertinent to the issue.

4. The petition distinctly alleged that they were in the possession of the defendant.

5. The answer of the defendant did not deny any one of the above four mentioned averments of the petition, but did raise two questions of law which the court has determined to be insufficient, and the court has in effect stricken them out of the answer and there remains no answer and hence the rule should be made absolute without qualification.

In a recent unreported case of Newlin vs. Langdon in the United States Circuit Court of New Jersey, the following order was made on October 12, 1906:

"United States Circuit Court, District of New Jersey.

JAMES W. M. NEWLIN

vs.

SAMUEL P. LANGDON.

On Contract.

Order.

And now, October 12, 1906, on motion of James W. M. Newlin, the plaintiff, pro se and no answer having been filed by the
239 defendant to the rule returnable October 1st, 1906, on the defendant to show cause why he should not produce upon the trial documentary evidence set forth in the plaintiff's petition and submit the same to inspection by the said petitioner and his counsel in advance of trial at such time and place as the Court shall hereafter fix. It is ordered that the defendant shall produce the said documentary evidence at the trial of the cause, and to that extent the rule to show cause is made absolute.

A copy of hereof which may be uncertified shall forthwith be served on the defendant.

JOSEPH CROSS, *Judge.*"

Your petitioner therefore prays for a rule to be granted on the defendant to show cause why the order made March 25, 1907, on the rule to produce granted January 30, 1907, should not be modified so as to read as follows: "Rule absolute."

And your petitioner will ever pray, etc.:

EDW. D. McLOUGHLIN,
*Trustee in Bankruptcy of Inter-
national Coal Mining Company.*

JAMES W. M. NEWLIN,
For Petitioner.

STATE OF PENNSYLVANIA,
City of Philadelphia, ss:

Edward D. McLoughlin, being duly sworn according to law, deposes and says that the facts set forth in the foregoing statement are true.

EDW. D. McLOUGHLIN.

Sworn to and subscribed before me this 27th day of March, 1907.

[SEAL.]

WM. A. RAFFERTY,
Notary Public.

Commission expires January 26th, 1911.

240 (Endorsed: 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Company vs. Pennsylvania Railroad Co. Petition of Trustee for modification of order of March 25, 1907, on rule to produce, etc. Before Holland, J. Rule to show cause granted as within prayed, returnable March 29th, 1907, at 10 o'clock a. m. By the Court. Attest: George Brodbeck, Jr., Deputy Clerk. Newlin. Filed Mar. 27, 1907. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY,
vs.
PENNSYLVANIA RAILROAD COMPANY.

To the Honorable the Judges of the said Court:

The answer of the International Coal Mining Company to the rule granted March 27, 1907, to show cause why the plaintiff should not be required to furnish a bill of particulars, etc., Respectfully Shows:

1. Respondent avers that all the information which the defendant asks to have furnished to it in the affidavit on which this rule is granted is already in the possession of the defendant, and respondent charges that this rule to show cause was not applied for in good faith for the purpose of enabling the defendant to go to trial, but that the rule was applied for in bad faith to harrass and
241 annoy the plaintiff and to put the plaintiff to unnecessary expense and for the purpose of delaying the trial of the cause after the repeated failure of other devices used for the same purpose and appearing on the face of the record of this cause to be an abuse of process on the part of the defendant.

2. Respondent further avers that the plaintiff's statement in this case was filed February 14, 1905, and that demurrers were filed,

which demurrers were withdrawn October 25, 1905, when pleas were filed. Respondent further shows that from that time to the present, the time of the Court and the time of this respondent's counsel has been taken up with repeated and persistent dilatory and frivolous pleas, each separate and to be succeeded by another, and so on as long as anything can be thought of for delay.

3. Respondent avers that it is *res adjudicata* between this respondent and the defendant that the said defendant is not entitled to the bill of particulars now claimed because in another suit between this respondent and the Pennsylvania Railroad Company, in the Court of Common Pleas No. 2, of Philadelphia County, to June Term, 1904, No. 3929, where the plaintiff's statement was similar to the plaintiff's statement in this cause, the said defendant therein obtained a rule for a more specific statement of the plaintiff's claim and averred in support of said rule that it was entitled to receive precisely the same information that it claims it is entitled to receive in the present cause.

The rule for a more specific statement in the said case pending in the State Court was granted March 9, 1905, and on March 11, 1905, the plaintiff filed an answer to the rule for a more specific statement which answer made the same charge as is made in the first paragraph of this answer, to wit: That the defendant had the information called for in its own possession and that the rule was

242 applied for in bad faith to harass the plaintiff. The Railroad Company in said cause in the State Court, did not undertake to controvert the charge of bad faith thus made in the State Court in circumstances exactly similar to the rule now pending in this cause and after an argument the State Court on March 28th, 1905, discharged the rule for a more specific plaintiff's statement and thereupon the defendant filed issue pleas.

4. The respondent now further answering the rule to show cause herein granted March 27, 1907, proposes to follow respondent's answer to the rule for a more specific plaintiff's statement in the State Court, and your respondent further avers as to the respective items of information called for by the plaintiff as follows:

5. 1. Date of Each Shipment Made.

Respondent says that as to the shipments set forth in schedule "a" which in connection with the body of the plaintiff's statement shows that the said shipments are from what is known in the coal trade in Pennsylvania as the Clearfield Region to South Amboy, that the shipments are given by years from April 1st to April 1st, of the years named from the Clearfield Region to South Amboy and this schedule gives the tonnage and manifest rate and avers that the shipments were to South Amboy "for trans-shipment by vessel," that South Amboy was the defendant's terminal. Respondent further avers that as to all of these shipments specified on schedule "a" to South Amboy, the defendant has in its possession accounts kept with the respondent, which accounts show every single shipment in all the period covered by this schedule "a" and giving the number of tons carried by the defendant for the respondent from

the Clearfield Region to South Amboy day by day as the shipments were made.

Respondent further says that it is advised by counsel that 243 to put all of the details of these daily shipments into the plaintiff's statement or into bills of particulars would be putting into such bills of particulars all the entries constituting all the books and papers of the respondent which do not have to be put in a bill of particulars and all of which information in exactly the same detail as the respondent has it the defendant now has, and the respondent further says, that the books of the defendant are so kept that those in charge of them can now with perfect ease tick off all the shipments to South Amboy sued on without further information from the respondent.

6. 2. Point of Origin of Each Shipment.

The respondent avers that it appears by the schedules attached to the plaintiff's shipment that in every case the point of delivery of the shipment is given and as to the point of origin, the plaintiff's statement distinctly avers that what is known as the Clearfield Region is the initial point of shipments and the counties and places are specified in the plaintiff's statement constituting the particular portions of the Clearfield District. Furthermore the respondent avers that the rates at the times of the shipments between all points, in the Clearfield Region and the different points of delivery were the same.

7.

3. Destination of each shipment.
4. Number of tons of coal embraced in each.
5. Net rate of freight paid on each shipment.
6. Names of consignors and consignees of each shipment.

Respondent avers as to points 3, 4, 5 and 6, above recited from the defendant's rule and as to points one and two hereinabove considered and constituting all the information called for by the defendant, the facts are these: Not only is the plaintiff as herein-

244 before charged in possession of all this information in its own books and papers kept at the time of the shipment, but furthermore during the period of the said shipments from time to time this respondent made claims on the Railroad Company for the payment of rebates on the said shipments and for the purpose of obtaining these said rebates this respondent furnished from time to time to the Railroad Company from the books of this respondent all of the information contained in points one, two, three, four, five and six at to the respective shipments, and the defendant on receiving said statements did then compare the same with the defendant's own books and ticked off and did find respondent's statement to be true and did pay to the respondent rebates from time to time on said shipments, which rebates, however, were less in amount than what was given by the defendant at the same period of time to other persons shipping between the same points and in like circum-

stances and the suit as to the first count is for the difference between the rebates allowed to other shippers and the smaller rebates allowed to the respondent.

The respondent avers that the defendant has received all this information twice, once in its own books and once in the statements made by respondent upon which rebates were claimed and paid, and now it asks the same informations a third time for the purpose of delay in the trial of this cause, and this respondent charges that the defendant has delayed making this claim for a bill of particulars until the present time, because it has just now failed on another effort to obtain a continuance, and the cause is ordered for trial on April 16, 1907.

The respondent further avers what is known to the defendant that this respondent is in bankruptcy and was driven into bankruptcy by the defendant giving larger rebates to other shippers than the respondent and that it has no clerical force to make statements that are not needed by the defendant, because it already has them, and the present demand for a bill of particulars is for the purpose
245 of hampering the respondent in preparing for trial by having put upon it an enormous and unnecessary amount of labor, and respondent avers that this rule was maliciously conceived for this unlawful purpose.

The respondent further calls the attention of the Court to the fact that the affidavit on which the rule of March 27, 1907, was obtained is very peculiarly drawn. It nowhere avers that the defendant does not now have the information called for, and it nowhere avers that it is necessary for the defendant to have the plaintiff furnish the information to defendant in order that the defendant may prepare for trial. The affidavit merely says, that the respondent should be required "to furnish a bill of particulars which should disclose the following information." The affidavit of Lewis Neilson, Secretary of the Pennsylvania Railroad Company, merely swears, "that he is advised by counsel and therefore suggests to the Court, that the defendant is entitled to require the plaintiff to furnish the information which the said defendant desired to secure from the bill of particulars above mentioned."

Respondent further avers that this is in substance the same method pursued in the State Court and unsuccessfully, because of the answer put in in the State Court, which is the same as the answer in the present cause, which is that the defendant has all the information above specified. The same counsel, Mr. Francis I. Gowen, had charge of this device in the State Court and has it here, and he knows that a similar answer will be put in, but he could not make the affidavit any stronger than it is, because no one could safely swear to the same.

5. Net Rate of Freight Paid on Each Shipment.

The respondent further avers that the defendant has and always did have all this information in its own possession. The defendant made its own open rate and paid rebates of different amounts to

different shippers and kept accounts thereof and as to the
 246 entire period of time within which respondent received rebates on its shipments the defendant has this information, because the defendant paid the rebates to this respondent and a record of the shipments was kept by a regular method of vouching pursued by the said defendant and in connection with all of the said shipments, on which rebates were paid, and those for 1900-1901, on which no rebates were paid to the respondent the defendant has all the information in its own possession set forth in points one, two, three, four, five and six of the affidavit on which the rule of March 27, 1907, was obtained.

Respondent therefore prays that the said rule may be discharged.

INTERNATIONAL COAL MINING CO.,

By J. CHESTER WILSON, *Secretary*.

JAMES W. M. NEWLIN,

For Respondent.

STATE OF PENNSYLVANIA,

County of Philadelphia, ss:

J. Chester Wilson, being duly sworn according to law, deposes and says that he is the Secretary of the respondent, the International Coal Mining Co., and that the statements made in this answer are true.

J. CHESTER WILSON.

Sworn to and subscribed before the undersigned this 28th day of March, A. D. 1907.

[SEAL.]

BENJ. H. RENSHAW.

Notary Public.

Commission expires Feb. 13, 1909.

247 (Endorsed: 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Company vs. Pennsylvania Railroad Co. Plaintiff's answer to rule of March 27, 1907, for bill of particulars. Newlin. Filed Mar. 28, 1907. Henry B. Robb, Clerk. By L. Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

VS.

PENNSYLVANIA RAILROAD COMPANY.

HOLLAND, J.:

On March 25th, 1907, an order was made on the defendant in this case to produce books and papers at the trial of the case. A petition had been presented, under Section 724 of Revised Statutes,

by the plaintiff for the production of books and papers. The defendant made answer, with other matters, that the action being one for the recovery of damages, in the nature of a penalty under the Interstate Commerce Act, the motion should be denied. The order to produce was not made absolute, but the question of requiring the production was left open for settlement at the trial. In this I think the order was not in proper form. It was the intention of the Court to require the production of the books, for the reason that the action is not for a penalty in a sense to exempt the defendant from the production of books in an action of this kind, and even if it be regarded as a suit for the recovery of damages as a penalty, or

248 in the nature of a penalty, the defendant, being a corporation, is not entitled to the privilege of refusing to produce its books and papers in a suit of this kind. *Hale vs. Henkel*, 201 U. S. 43; *Nelson vs. U. S.*, 201 U. S., 92.

And now, April 2d, 1907, on motion of James W. M. Newlin, for the plaintiff, and the answer filed by the defendant to the rule returnable February 13th, 1907, on the defendant to show cause why it should not produce upon the trial the documentary evidence set forth in the affidavit of J. Chester Wilson, the secretary of the plaintiff, upon which the rule to show cause was granted, having been determined by the Court to be insufficient, it is ordered that the defendant shall produce the said documentary evidence at the trial of the cause, and the rule to show cause is made absolute.

(Endorsed: No. 69. April Sessions, 1904. U. S. C. C. *International Coal Mining Co. vs. Pennsylvania Railroad Co.* Opinion. Holland, J. Making absolute rule to show cause why defendant should not produce at the trial certain documentary evidence. Filed Apr. 3, 1907. Henry B. Robb, Clerk. By B., Deputy Clerk.)

249 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

HOLLAND, J.:

On motion of the defendant a rule was granted on the plaintiff to show cause why it should not furnish the defendant with a bill of particulars which should disclose (1) the date of each shipment made in the statement; (2) the point of origin of each shipment; (3) destination of each shipment; (4) number of tons of coal embraced in each shipment; (5) rate of freight paid on each shipment; (6) names of consignors and consignees of each shipment.

At the argument of this rule the plaintiff offered to produce its books and papers at the office of the Clerk of the Circuit Court for

defendant's inspection. These books and papers, however, were to remain in the control of the Circuit Court. The plaintiff asserts that owing to a lack of clerical force on its part this is the most expeditious and certain way of furnishing the defendant with the information which it desired and to which it is entitled. The defendant raised no objection to this method of obtaining the information.

We, therefore, direct the plaintiff, upon notice from the defendant as to the time it desires to begin the examination, to produce such books and papers containing the information above mentioned in regard to the matters contained in the statement, and place the same in the possession of the Clerk of Circuit Court for the inspection and examination of the defendant, its attorneys and clerks, the books to remain in the possession of the said clerk.

(Endorsed: No. 69. April Sessions, 1904. U. S. C. C. International Coal Mining Co. vs. Pennsylvania Railroad Co. Opinion. Holland, J. Directing plaintiff to produce certain books and papers. Filed Apr. 3, 1907. Henry B. Robb, Clerk. By B., Deputy Clerk.)

Exemplification.

COUNTY OF PHILADELPHIA,

State of Pennsylvania, set:

Among the records and proceedings of the Court of Common Pleas No. 1 for the County of Philadelphia, State of Pennsylvania, the following may be found as matter of file and of record at No. 3588, June Term, 1901, to wit:

Docket Entries.

June Term, 1901.

Shapley & Ballard.*

G. S. Patterson for gar. Oct. 28, 1903.*

CRESSON & CLEARFIELD COAL	Sums. Assumpsit.
AND COKE CO.	Exit Aug. 15, 1901.
vs.	Ret. 3 Mon., Aug., 1901.
INTERNATIONAL COAL MINING	Served.
Co.	Oct. 12, 1901, Judgt. for want of an Aff. of defence.
Aug. 16, 1901, Statement and Rule to file Aff. of defence filed.	Ex die Dam. Assd., \$718.95.
Oct. 12, 1901, Proof of service of Statement, Rule to file Aff. of defence on Aug. 16, 1901, filed.	Oct. 24, 1903, Fi. Fa. Exit Ret. 1 Mon., Nov., 1903.
	Nulla Bona.
	July 14, 1905, Fi. Fa. Exit Ret. 1 Mon., Aug., 1905.
	Unsatisfied.

* On left margin in copy.

Oct. 24, 1903, att. sur Judgt. vs. Pennsylvania Railroad Company, Garnishee Exit, Ret. 1 Mon., Nov., 1903.

Att. as commanded and made known to Garnishee also Deft. Sept. 7, 1905, Rule to set aside the special Writ of Fieri Facias issued July 14, 1905, all proceedings to be stayed in the meantime.

Eo die petition of Deft. filed Sept. 19, 1905, Rule discharged (see decree).

Oct. 12, 1905, Certificate of Auditor General and State Treasurer of full payment of Taxes due the Commonwealth. Act of June 1, 1899, filed.

Aug. 16, 1905, Petition of the Cresson and Clearfield Coal and Coke Company filed praying the Court to direct that a special Writ of Fieri Facias shall issue to the Sheriff of Philad'a County directing to sell all the chartered rights, privileges and franchises of the said International Coal Mining Company, including the franchises, rights to be a corporation, together with all property, Real, Personal and Mixed, and all Book Accounts, claims, choses in action, causes in action, arising out of contracts, torts or penalties and assets of every description belonging to or in any way appertaining to said International Coal Mining Company, excepting only Lands held in fee, as provided by Section 1 of the Act of Apl. 7, 1870.

Eo die Decree made—see Decree.

252 Common Pleas No.—, June Term, 1901.

No. —.

CRESSON & CLEARFIELD COAL & COKE COMPANY

vs.

INTERNATIONAL COAL MINING COMPANY.

To the Prothy.:

Issue summons assumpsit in above case, returnable to the third Monday of August.

SHAPLEY & BALLARD,
Attys. for Plaintiff.

(Endorsed: No. 3588. June Term, 1901. C. P. No. 1. Cresson & Clearfield Coal & Coke Co. vs. International Coal Mining Co. Præcipe for Summons Assumpsit. Shapley & Ballard. Filed Aug. 15, 1901. Raines, pro Prothy.)

COUNTY OF PHILADELPHIA, ss:

Summons Assumpsit.

The Commonwealth of Pennsylvania to the Sheriff of the County of Philadelphia, Greeting:

[SEAL.]

We command you that you summon International Coal Mining Company, late of your county, so that it be and appear before our Judges at Philadelphia, at our Court of Common Pleas No. 1, of the County of Philadelphia, to be holden at Philadelphia, in and for the said County, on the third Monday of August 253 next, there to answer Cresson and Clearfield Coal and Coke Company of a plea of assumpsit. And to have you then and there this writ.

Witness the Honorable Craig Biddle, President of our said Court, at Philadelphia, the 15th day of August in the year of our Lord, one thousand nine hundred and one (1901).

SOLOMON RAINES,
Pro Prothonotary.

Served the International Coal Mining Company, the within-named defendant corporation, by handing, August 15th, 1901, a true and attested copy of the within writ to H. W. Lambirth, President of the within-named defendant corporation.

So answers

PETER SAYBOLT,
Deputy Sheriff.
WENCEL HARTMAN, *Sheriff.*

(Endorsed: 3588. June Term, 1901. Court of Common Pleas No. 1 Cresson & Clearfield Coal and Coke Co. vs. International Coal Mining Co. Summons Assumpsit. Shapley & Ballard.)

254 Common Pleas No. 1, June Term, 1901.

No. 3588.

CRESSON & CLEARFIELD COAL & COKE COMPANY
vs.
INTERNATIONAL COAL MINING COMPANY.

Statement of Plaintiff's Claim.

The Plaintiff, Cresson & Clearfield Coal & Coke Company (a corporation existing under the laws of the State of Pennsylvania) brings this suit against the defendant, International Coal Mining Company (a corporation organized under the laws of the State of Pennsylvania) to recover the sum of Eight Hundred and Ten Dollars (\$810), with interest from August 2d, 1901, due upon a certain

promissory note given by said defendant to said plaintiff of which the following is a true copy:

\$810.00

PHILADELPHIA, *July 2, 1901.*

Thirty days after date, we promise to pay to the order of Cresson & Clearfield Coal & Coke Co. Eight hundred and ten.....Dollars at 706 Betz Bldg.

Without defalcation. Value received.

(Sgd.)

INTERNATIONAL COAL MINING CO.
J. CHESTER WILSON, *Treasurer.*

No. —. Due —.

Said note is endorsed "International Coal Mining Co."

And having delivered the said note to the plaintiff the said defendant became liable for the payment of the same according
255 to the tenor and effect thereof, but, although said note was presented for payment at the time and place therein named and payment thereof demanded in accordance with its terms, the defendant failed and refused to pay the same and has since neglected and refused to pay the same or any part thereof.

Wherefore plaintiff brings this suit.

CRESSON & CLEARFIELD COAL & COKE CO.,
By SHAPLEY & BALLARD, *Att'ys.*

PHILADELPHIA COUNTY, ss:

P. H. Walls, being duly sworn according to law, deposes and says that he is the General Manager of the above named plaintiff, and that the facts set forth in the foregoing statement as the basis of Plaintiff's Claim are true.

P. H. WALLS, *Manager.*

Sworn to and subscribed before me this 16th day of August, A. D. 1901.

[SEAL.]

EDGAR W. LANK,
Notary Public.

Commission expires January 14, 1905.

(Endorsed: 3588, June Term, 1901. C. P. No. 1. Cresson & Clearfield Coal & Coke Co. v. International Coal Mining Co. Statement of Plaintiff's Claim. Enter rule on above defendant to file an affidavit of defense within fifteen days or judgment sec. reg. Shapley & Ballard, Attorneys for Plaintiff. To Proth'y C. C. P. 8|16|1907. Filed Aug. 16, 1901. Pro. Proth'y. Shapley & Ballard.)

256 — Common Pleas No. 1, June Term, 1901.

No. 3588.

CRESSON & CLEARFIELD COAL & COKE COMPANY

VS.

INTERNATIONAL COAL MINING COMPANY.

Statement of Plaintiff's Claim.

The Plaintiff, Cresson & Clearfield Coal & Coke Company (a corporation existing under the laws of the State of Pennsylvania) brings this suit against the defendant, International Coal Mining Company (a corporation organized under the laws of the State of Pennsylvania) to recover the sum of Eight hundred and ten Dollars (\$810), with interest from August 2nd, 1901, due upon a certain promissory note given by said defendant to said plaintiff of which the following is a true copy:

\$810.00.

PHILADELPHIA, *July 2, 1901.*

Thirty days after date, we promise to pay to the order of Cresson & Clearfield Coal & Coke Co. Eight hundred and ten — Dollars at 706 Betz. Bldg.

Without defalcation. Value received.

(Sgd.)

INTERNATIONAL COAL MINING CO.
J. CHESTER WILSON,

Treasurer.

No. —. Due —.

Said note is endorsed "International Coal Mining Co."

And having delivered the said note to the plaintiff, the said defendant became liable for the payment of the same according to the tenor and effect thereof, but, although said note was presented for payment at the time and place therein named and payment thereof demanded in accordance with its terms, the defendant failed and refused to pay the same and has since neglected and refused to pay the same or any part thereof.

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Wherefore plaintiff brings this suit.

CRESSON & CLEARFIELD COAL & COKE CO.,
By SHAPLEY & BALLARD, Att'ys.

PHILADELPHIA COUNTY, ss:

P. H. Walls, being duly sworn according to law, deposes and says that he is the General Manager of the above named plaintiff and that the facts set forth in the foregoing statement as the basis of Plaintiff's Claim are true.

Sworn to and subscribed before me this — day of August, A. D. 1901.

PHILADELPHIA COUNTY, ss:

J. Blaine MacMillan, being duly sworn according to law, deposes and says that he served a copy of the statement filed in the above case (of which the foregoing is a true copy) upon Henry W. Lambirth, President of the International Coal Mining Company, the defendant, at its office, Room 706 Betz Building, on the 16th day of August at or about 11 o'clock, by handing the same to him personally.

Further deponent saith not.

J. BLAINE MACMILLAN.

Sworn to and subscribed before me this 28th day of August, 1901.

[SEAL.]

W. NELSON L. WEST,

Notary Public.

Commission expires January 19th, 1903.

(Endorsed: 3588. June Term, 1907. C. P. No. 1. Cresson & Clearfield C. & C. Co. v. International Coal Mining Co. Proof of service of Statement and Rule. Filed Oct. 12, 1901. C. B. R., Pro Proth'y. Shapley & Ballard.)

258 Common Pleas No. 1, June Term, 1901.

No. 3588.

CRESSON & CLEARFIELD COAL & COKE COMPANY

vs.

INTERNATIONAL COAL MINING COMPANY.

To the Prothonotary:

Enter judgment in the above case in favor of the plaintiff and against the defendant for want of an affidavit of defense and assess damages as below.

SHAPLEY & BALLARD,

Attorneys for Plaintiff.

Assessment of Damages.

I assess damages as below:

Amount claimed in statement.....	\$810.00
Interest from 8 | 2 to 10 | 12 | 1901.....	9.45
	<hr/>
	\$819.45

Cr.

Paid on account 9 | 12 | 1901.....	\$100.00
Int. from 9 | 12 | 1901 to 10 | 12 | 1901.....	.50
	<hr/>
	100.50
	<hr/>
	\$718.95

C. B. R.,

Pro Proth'y.

10 | 12 | 1901.

11—168

(Endorsed: 3588. June Term, 1901. C. P. No. 1. Cresson & Clearfield Coal & Coke Company v. International Coal Mining Company. Order for Judgment and Assessment of Damages. Filed Oct. 12, 1901. C. B. R., Pro Proth'y. Shapley & Ballard.)

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Judgment Index.

Defendant	Plaintiff	Court	Term	No.	Attorney	Date.	Amount
International Coal Mining Co.	Cresson & Clearfield Coal & Coke Co.	1	J 01	3588	Shapley	1901 Oct. 12	\$718.95

Common Pleas No. 1, June Term, 1901.

No. 3588.

CRESSON & CLEARFIELD COAL & COKE COMPANY
vs.

INTERNATIONAL COAL MINING COMPANY.

To Prothonotary:

Issue Fieri Facias in above case. Returnable the first Monday of November next.

Real debt \$718.95.

Int. from 10 | 12 | 1901 to 10 | 24 | 1903.

SHAPLEY & BALLARD,
Attorneys for Plaintiff.

(Endorsed: No. 3588. June Term, 1901. C. P. No. 1. Cresson & Clearfield Coal & Coke Co. vs. International Coal Mining Company. Præcipe for Fi. Fa. Filed Oct. 24, 1903. Raines, Pro Proth'y. Shapley & Ballard.)

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Fieri Facias.

COUNTY OF PHILADELPHIA, ss:

The Commonwealth of Pennsylvania to the Sheriff of the County of Philadelphia, Greeting:

We command you that of the goods and chattels, lands and tenements of the International Coal Mining Company, defendant, in your bailiwick, you cause to be levied as well as the sum of seven hundred and eighteen dollars and ninety-five cents, lawful money of Pennsylvania, which was adjudged Cresson & Clearfield Coal & Coke Company, plaintiff lately, in our Court of Common Pleas No. 1, of the County of Philadelphia, in a certain action of assumpsit between the said plaintiff and said defendant; as also the sum of ten dollars and eighty-seven cents for the cost and charges by the said plaintiff about said suit in that behalf expended, whereof the said defendant was convict, as appears of record, &c.

And you have those moneys before our Judges, at Philadelphia, at our said Court, there to be held the first Monday of November

next, to render to the said plaintiff for the judgment debt, damages and cost aforesaid. And have you then and there this writ.

Witness the Honorable Craig Biddle, President Judge of our said Court, at Philadelphia, the 24th day of October, in the year of our Lord, one thousand nine hundred and one (1901).

[SEAL.]

SOLOMON RAINES,
Pro Prothonotary.

Nulla Bona.
So answers

PETER SAYBOLT,
Dep. Sheriff.
JAMES L. MILES,
Sheriff.

261 (Endorsed: 3588. June Term, 1901. Court of Common Pleas No. 1. Cresson & Clearfield C. & C. Co. vs. International Coal Mining Co. Fieri Facias. Real debt, \$718.95. Int. from 10|12|1901; Att'y, &c., \$7.25; Proth'y, \$3.37; Crier and Sat., 25c.; Fi. Fa. \$1.50; Service, 25c.; Att. sur Judg't, \$1.25; Att'y, &c., \$6.00; Proth'y, \$3.62; Gar. Att'y, \$13.00; Costs act. of 4|29|01, \$2.00. Sheriff's office Oct. 24, 1903, 10.20 o'clock a. m. Shapley & Ballard.)

Common Pleas No. 1, June Term, 1901.

No. 3588.

CRESSON & CLEARFIELD COAL & COKE COMPANY
vs.
INTERNATIONAL COAL MINING COMPANY

To the Prothonotary:

Issue attachment execution against International Coal Mining Company, defendant, and endorse the same with directions to the Sheriff to attach all and singular the goods and chattels, rights and credits, moneys and property of the defendant in whose hands the same may be, and specially in the hands of Pennsylvania Railroad Company, and to summon them as Garnishees. Returnable to the first Monday of November next.

SHAPLEY & BALLARD,
Attorneys for Plaintiff.

10|24|1903.

(Endorsed: No. 3588. June Term, 1901. C. P. No. 1. Cresson & Clearfield Coal & Coal Company vs. International Coal Mining Company. Praecipe for attachment vs. Penna. R. Co. Filed Oct. 24, 1903. Raines, Pro Proth'y. Shapley & Ballard.)

Attachment sur Judgment.

COUNTY OF PHILADELPHIA, ss:

The Commonwealth of Pennsylvania to the Sheriff of the County of Philadelphia, Greeting:

We command you that you levy upon and attach the goods and chattels, stocks, moneys and interests of, and debts due to International Coal Mining Company, defendant, in satisfaction of a certain judgment, obtained in our Court of Common Pleas No. 1, of the County of Philadelphia, at the suit of Cresson & Clearfield Coal & Coke Company, plaintiff, against the said defendant of June Term, 1901, No. 3588, for the sum of seven hundred and eighteen dollars and ninety-five cents with interest from the 12th day of October, 1901, and costs.

And also, that by honest and lawful men of your bailiwick, you make known to the said defendant and to the Pennsylvania Railroad Company and all other persons in whose hands or possession the said goods and chattels, stocks, moneys, interest and debts, or any of them may be attached, as garnishees, that they be and appear before our said Court at Philadelphia, on the first Monday of November next, to show if anything they, the said defendant or the said garnishees have to say, why the said judgment, besides costs of suit, should not be levied of the effects of the said defendant in the hands of the said garnishees. And have you then and there this writ.

Witness the Honorable Craig Biddle, President Judge of our said Court, at Philadelphia, the 24th day of October, in the year 263 of our Lord one thousand nine hundred and one (1901).

SOLOMON RAINES,

[SEAL.]

Pro Prothonotary.

Attached as within commanded and made known to the Pennsylvania Railroad Co., garnishees, by handing, October 24, 1903, at 10 o'clock, 45 minutes a. m., a true and attested copy of the within writ to R. M. Smith, Treasurer of said Company, and summoned the International Coal and Coke Co., defendant, by handing, October 24, 1903, a like copy to H. Lambirth, President of said Company.

So answers

PETER SAYBOLT,

*Deputy Sheriff.*JAMES L. MILLS, *Sheriff.*

(Endorsed: 3588. June Term, 1901. Court of Common Pleas No. 1. Cresson & Clearfield Coal & Coke Co. v. International Coal Mining Co., def't, Pennsylvania R. R. Co., Gar. Att. sur Judgment. Real Debt, \$718.95; Int. from 10/12/1901; Att'y Writ, &c., \$7.25; Proth'y, \$3.37; Cr. and Sat., 25c.; Fl. Fa., \$1.50; Att. sur Judgment, \$1.25; Costs on same Att'y, &c., \$6.00; Proth'y, \$3.62; Gar. Att'y, \$13.00. Sheriff's office 10.20 o'clock a. m. Shapley and Ballard.)

264

Common Pleas No. 1, June Term, 1901.

No. 3588.

CRESSON & CLEARFIELD COAL & COKE COMPANY
vs.
INTERNATIONAL COAL MINING COMPANY.

To the Prothonotary Court of Common Pleas:

Enter my appearance for the Pennsylvania Railroad Company,
Garnishee in the above case.

GEORGE STUART PATTERSON,
Attorney for the Pennsylvania Railroad Company, Garnishee.

Oct. 26, 1903.

(Endorsed: No. 3588. June Term, 1901. C. P. No. 1. Cresson & Clearfield Coal & Coke Company vs. International Coal Mining Company, defendant, and The Pennsylvania Railroad Company, garnishee. Appearance Pennsylvania R. R. Co., garnishee. Filed Oct. 26, 1903. J. Kenderdine, Pro Proth. George Stuart Patterson.)

265

Common Pleas No. 1, June Term, 1901.

No. 3588.

CRESSON & CLEARFIELD COAL & COKE COMPANY
vs.
INTERNATIONAL COAL MINING COMPANY.

To Prothonotary:

Issue Fi Fa. in above entitled case, returnable first Monday in
August next.

SHAPLEY & BALLARD,
Attorney for Plaintiff.

7/14/05.

\$7.18 95-100.

Int. Oct. 12, 1901.

(Endorsed: No. 3588. June Term, 1901. C. P. No. 1. Cresson & Clearfield C. & C. Co. vs. International Coal Mining Company. Præcipe Fi. Fa. Filed July 14, 1905. Hunter, Pro Proth'y. Law offices Shapley & Ballard, Land Title Building, Philadelphia.)

Fieri Facias.

COUNTY OF PHILADELPHIA, ss:

The Commonwealth of Pennsylvania to the Sheriff of the County of Philadelphia, Greeting:

We command you, that of the goods and chattels, lands and tenements of International Coal Mining Company, defendant
 266 in your bailiwick, you cause to be levied as well *as* the sum of seven hundred and eighteen dollars and ninety-five cents, lawful money of Pennsylvania, which was adjudged the Cresson and Clearfield Coal & Coke Company, plaintiff lately, in our Court of Common Pleas No. 1, of the County of Philadelphia, in a certain action of Assumpsit between the said plaintiff and said defendant; as also the sum of ten dollars and eighty-seven cents for the cost and charges by the said plaintiff about its suit in that behalf expended, whereof the said defendant is convict, as appears of record, &c.

And you have those moneys before our Judges, at Philadelphia, at our said Court, there to be held the first Monday August next, to render to the said plaintiff for the judgment debt, damages and cost aforesaid.

And have you then and there this writ.

Witness the Honorable Craig Biddle, President Judge of our said Court, at Philadelphia, the 14th day of July, in the year of our Lord, one thousand nine hundred and five (1905).

[SEAL.]

J. U. G. HUNTER,

Pro Pro-nothary.

To the Honorable the Judges within named:

I do hereby certify and return that in obedience to the within writ on August 1, 1905, I demanded of Henry Lambirth, President of the International Coal Mining Company, the within named defendant, at the principal office of said Company, 920 Betz Building, during the usual office hours, a sufficient amount of money to pay the debt, interest and costs of the within writ, and said demand being refused upon the plea of no funds, and there being no
 267 personal property pointed out to me upon which I could *not* levy for said amount, I thereupon return the within writ unsatisfied.

So answers

PETER SAYBOLT,

*Deputy Sheriff.*JAMES L. MILES, *Sheriff.*

(Endorsed: 3588. June Term, 1901. Count of Common Pleas No. 1. Cresson & Clearfield Coal & Coke Company vs. International Coal Mining Company, 70 Bullitt Bldg., 920 Betz Bldg., Phila. Fieri Facias. Real Debt. \$718.95; Int. from Oct. 12, 1901; Att'y, &c., \$7.25; Pro'thy, \$3.37; Crier and Sat., 25c.; Fi. Fa., \$1.50; Service, 25c.; Costs, act. of 4|29|01, \$2.00. Shapley & Ballard.)

Common Pleas No. 1, June Term, 1901.

No. 3588.

CRESSON & CLEARFIELD COAL & COKE COMPANY
vs.
INTERNATIONAL COAL MINING COMPANY.

The Petition of the Cresson & Clearfield Coal & Coke Company respectfully represents:

1. That on the 12th day of October, 1901, your petitioner obtained a judgment against defendant in the sum of seven hundred and eighteen dollars and ninety-five cents (\$718.95).

268 2. That a Writ of Fieri Facias upon said judgment duly issued out of the office of your Honorable Court on the 14th day of July, 1905.

3. That the Sheriff of Philadelphia County, to whom said Writ of Fieri Facias was directed, made return upon said Writ in the words following:

"I do hereby certify and return that in obedience to the within Writ on the 1st day of August, 1905, I demanded on Henry W. Lambirth, President of the International Coal Mining Company, the within named defendants, at the principal office of said Company, 920 Betz Building Philadelphia, during the usual office hours, a sufficient amount of money to pay the debt, interest and costs of the within Writ, and said demand being refused on the plea of no funds, and there being no personal property pointed out to me upon which I could levy for the said amount, I thereupon return the within Writ unsatisfied."

4. That your petitioner prays your Honorable Court to direct that a Special Writ of Fieri Facias shall issue to the Sheriff of Philadelphia County directing him to sell all the chartered rights, privileges and franchises of the said International Coal Mining Company, including the franchise right to be a corporation, together with all property, real, personal and mixed, and all book accounts, claims, choses in action, causes in action arising out of contracts, torts or penalties and assets of every description, belonging to, or in any way appertaining to, said International Coal Mining Company, excepting only lands held in fee, as provided by Section 1 of the Act of April seventh, 1870.

And your petitioner will ever pray, &c.

THE CRESSON & CLEARFIELD COAL &
COKE COMPANY,
SHAPLEY & BALLARD, Att'ys.

269 COUNTY OF PHILADELPHIA, ss:

Andrew Taggart, bookkeeper of the Cresson & Clearfield Coal & Coke Company in charge of its accounts, being duly sworn according to law, deposes and says that the facts set forth in the fore-

gong petition are true to the best of his knowledge, information and belief.

ANDREW TAGGART.

Sworn and subscribed before me this 16th day of August, 1905.

BERNARD J. O. CONNELL,
Notary Public.

[SEAL.]

Commission expires March 24, 1907.

Common Pleas No. 1, June Term, 1901.

No. 3588.

CRESSON & CLEARFIELD COAL & COKE COMPANY

VS.

INTERNATIONAL COAL MINING COMPANY.

Decree.

And now, this 16th day of August, 1905, the Court upon consideration of the foregoing petition asking for the issuance of a Special Writ of Fieri Facias, do order and direct the Sheriff to levy upon and sell all and singular the chartered rights, privileges and franchises of the said International Coal Mining Company, including the franchise right to be a corporation, together with all property, real, personl and mixed and all book accounts, claims, choses
270 in action, causes in action arising out of contracts, torts or penalties and assets of every description, belonging to, or in any way appertaining to, said International Coal Mining Company, excepting only lands held in fee, as provided by Section 1 of the Act of April seventh, 1870.

By the Court,

CHAS. Y. AUDENRIED.

(Endorsed: C. P. No. 1. No. 3588. June Term, 1901. Cresson & Clearfield Coal & Coke Company vs. International Coal Mining Company. Petition for Fieri Facias. Filed Aug. 16, 1905. Hunter, Pro Proth'y. Law offices Shapley & Ballard, Land Title Bldg., Philadelphia.)

Common Pleas No. 1, June Term, 1901.

No. 3588.

CRESSON & CLEARFIELD COAL & COKE COMPANY

VS.

INTERNATIONAL COAL MINING COMPANY, Defendant; PENNSYLVANIA RAILROAD COMPANY, Garnishee.

To the Honorable the Judges of said Court:

The petition of the International Coal Mining Company, defendant in the above case, respectfully represents:

That the International Coal Mining Company is a corporation

engaged in the business of selling coal, and being duly chartered under the laws of the State of Pennsylvania.

271 That on the 12th day of October, 1901, the plaintiff obtained judgment against the defendant in the sum of seven hundred and eighteen dollars and ninety-five cents (\$718.95). That thereafter, to wit, on the 24th day of October, 1903, the plaintiff caused a writ of Fieri Facias to be issued returnable the first Monday of November, 1903, which was thereafter returned *n'a bona*.

That on the said 24th day of October, 1903, the plaintiff in said suit caused to be issued an attachment *sur* judgment against the defendant, your petitioner, and summoned the Pennsylvania Railroad Company as garnishee, attaching all of the property or rights of property of the defendant due from the Pennsylvania Railroad Company to the defendant, which attachment is still pending and undetermined, as appears of record in said cause.

That on the 14th day of July, 1905, the said plaintiff caused to be issued a special writ of Fieri Facias under the Act of April 7, 1870, for the sale of the franchises and all of the property and property rights of the defendant, which writ was returnable the first Monday of August, 1905.

That the said writ of attachment issued October 24th, 1903, is still pending and undetermined, by which all of the property of the defendant has been attached by the plaintiff; that no discontinuance has been made of record of said attachment.

That the High Sheriff of Philadelphia has caused to be advertised in the Public Ledger for the City and County of Philadelphia, the sale of said franchises to take place on Friday, September 8th, 1905, without naming any hour at which said sale is to take place.

Your petitioner further shows to your Honorable Court that it is indebted to various creditors, aggregating approximately ten thousand dollars (\$10,000). That the only asset which the Company

272 has for the payment of its debts consists of its suits against the Pennsylvania Railroad Company for discrimination in coal freights, which fact is well known to the plaintiff. That there is justly due by the Pennsylvania Railroad Company to the defendant a sum of money in excess of the judgment with interest and costs due the plaintiff in the above suit.

Your petitioner is advised and therefore avers that no special writ of Fieri Facias could issue under the provisions of the Act of April 7, 1870, while a writ of attachment remains pending and undetermined in said cause. That if a sale is permitted to take place all of the property and property rights of the defendant will be sacrificed.

Your petitioner therefore prays for a rule on the plaintiff and James L. Miles, High Sheriff of the City and County of Philadelphia, to show cause why the special writ of Fieri Facias issued July 14th, 1905, should not be set aside and all proceedings stayed in the meantime.

INTERNATIONAL COAL MINING COMPANY.
HENRY W. LAMBIRTH, *Prest.*

(Endorsed: No. 3588. June Term, 1901. Court of Common Pleas No. 1. Cresson & Clearfield Coal & Coke Co. versus International Coal Mining Co., defendant, Pennsylvania Railroad Co., garnishee. And now, this 7th day of Sept. 1905, on motion of W. Horace Hepburn, Esq., the Court grants a rule on the plaintiff in the above case and James L. Miles, High Sheriff of the City and County of Philadelphia, to show cause why the special writ of Fieri Facias issued July 14, 1905, should not be set aside; all proceedings to be stayed in the meantime. Returnable Monday, Sept. 18, 1905. Abraham M. Beitler, J. W. Horace Hepburn, Atty. Pro.)

273 Common Pleas No. 1, June Term, 1901.

No. 3588.

CRESSON & CLEARFIELD COAL & COKE COMPANY
vs.
INTERNATIONAL COAL MINING COMPANY.

And now, to wit, this 19th day of September, 1905, the rule taken by the defendant on the plaintiff to show cause why the special writ of Fieri Facias issued August 16th, 1905, should not be set aside, is discharged, and the Sheriff is hereby ordered to proceed as directed by said special writ of Fieri Facias, and to sell the property and franchises therein named on Friday, September 29th, 1905, at 10 a. m., after the usual advertisement of the same, and to have the moneys before our Judges at Philadelphia, at our said Court, there to be held the first Monday of October next, to render to the said plaintiff for the said judgment debt, damages and costs aforesaid.

CRAIG BIDDLE, P. J.

(Endorsed: No. 3588. June Term, 1901. C. P. No. 1. Cresson & Clearfield Coal & Coke Company vs. International Coal Mining Company. Order discharging defendant's rule. Filed Sept. 19, 1905. D. Law Offices Shapley & Ballard, Land Title Building, Philadelphia.)

274 COUNTY OF PHILADELPHIA:

Fieri Facias.

Commonwealth of Pennsylvania to the Sheriff of Philadelphia County, Greeting:

We command you, as before we did, that of the goods and chattels, lands and tenements of the International Coal Mining Company, defendant, in your bailiwick, described as follows: All and singular the chartered rights, privileges and franchises of the said International Coal Mining Company, including the franchise right to be a corporation, together with all property, real, personal and mixed, and all book accounts, claims, choses in action, causes in action

arising out of contracts, torts or penalties and assets of every description, belonging to, or in any way appertaining to, said International Coal Mining Company, excepting only lands held in fee, as provided by Section 1 of the Act of April 7th, 1870, you cause to be levied as well as the sum of seven hundred and eighteen dollars and ninety-five cents (\$718.95), lawful money of Pennsylvania, which was adjudged the Cresson & Clearfield Coal & Coke Company, plaintiff lately, in our Court of Common Pleas No. 1, of the County of Philadelphia, in a certain action of assumpsit between the said plaintiff and the said defendant, and also the sum of ten dollars and eighty-seven cents for the costs and charges by the said plaintiff about its suit in that behalf expended, whereof the said defendant is convict, as appears of record, &c.

And you have those moneys before our Judges at Philadelphia, at our said Court, there to be held the third Monday of September next, to render to the said plaintiff for the judgment debt, damages and costs aforesaid. And you have then and there this writ.

275 Witness the Honorable Craig Biddle, President Judge of our said Court, at Philadelphia, the 16th day of August A. D. 1905.

J. U. G. HUNTER,

Prothonotary.

To the Honorable Judges within named:

I do certify that in obedience to the within writ, I duly advertised for sale the property described hereafter, to be sold on September 8th, 1905; that on September 6th, 1905, the within named defendant took a rule on the plaintiff to show cause why the within writ should not be set aside, all proceedings to be stayed in the meantime; that this rule was granted on the 7th day of September, 1905; that on September 19th this rule was discharged and an order made by the Court, which is attached hereto, directing that the property described hereafter be sold on Friday, September 29th, 1905; that in obedience to the within order, after giving due and legal notice of the time and place of sale, by hand bills put up in the most public places in my bailiwick, on Friday, September 29, 1905, at 10 a. m., at the Sheriff's office, Rooms 467-87, fourth floor, west corridor, in the City Hall of Philadelphia, I exposed the property, goods and franchises described as follows:

"All and singular the chartered rights, privileges and franchises of the International Coal Mining Company, including the franchise right to be a corporation, together with all property, real, personal and mixed, and all book accounts, claims, choses in action, causes in action arising out of contracts, torts or penalties and assets of every description, belonging to, or in any way appertaining to said International Coal Mining Company, excepting only lands held in fee," as provided by Section 1 of the Act of April 7th, 1870. To

276 sale by public vendue or outery and sold the same to P. H. Walls for the price or sum of forty dollars (\$40), he being the highest bidder and that being the best price bidden for the same,

which money I now have ready before the Judges within named to render as by said writ I am commanded.

JAMES L. MILES, *Sheriff*.
PETER SAYBOLT,
Deputy Sheriff.

(Endorsed: C. P. No. 1. No. 3588, June Term, 1901. Cresson and Clearfield Coal and Coke Company vs. International Coal Mining Company. Fieri Facias vs. Franchises, etc. Real Debt, \$718.95; Oct. 12, 1901; Att'y, &c., \$7.25; Prothy, \$3.62; Cri. Sat., 25c.; 2 Fi. Fa., \$3.00; Service, 25c.; Costs Act. of 5/29/01, \$2.50. Law offices Shapley & Ballard, Land Title Bldg., Philadelphia.)

Common Pleas No. 1 of Philadelphia County, June Term, 1901.

No. 3588.

In the Matter of CRESSON & CLEARFIELD COAL & COKE COMPANY
vs.
INTERNATIONAL COAL MINING COMPANY.

Be it remembered, That on the 19th day of September, 1905, on motion of Shapley & Ballard, Esquires, the Court made the following order:

And now, to wit, this 19th day of September, 1905, the
277 rule taken by the defendant on the plaintiff to show cause why the Special Writ of Fieri Facias issued Aug. 16th, 1905, should not be set aside, is discharged, and the Sheriff is hereby ordered to proceed as directed by said Special Writ of Fieri Facias, and to sell the property and franchises therein named on Friday, September 29th, 1905, at 10 a. m., after the usual advertisement of the same, and to have the moneys before our Judges at Philadelphia, at our said Court, there to be held the first Monday of October next, to render to the said plaintiff for the said judgment debt, damages and costs aforesaid.

CRAIG BIDDLE, *P. J.*

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court at Philadelphia, the 20th day of Septem., 1905.

CHAS. MEARS,
Pro Prothonotary.

(Endorsed: No. 3588. June Term, 1901. Court of Common Pleas, No. —, for the County of Philadelphia. Cresson & Clearfield Coal & Coke Company vs. International Coal Mining Company. Certificate. Of order discharging rule to set aside Fi. Fa. and Stay Sale.)

Ledger E.
Page 585.
Box 274.

Ledger 7.
Page 145.
14849.

International Coal Mining Company in account with the Commonwealth of Pennsylvania, Dr.

To Tax on Capital Stock for the Year Ended the First Monday of November, 1898, Based Upon the Report and Papers Herewith Filed.

278	To settlement of August 10, 1899, superseded....	125.00
	Actual value in cash of Capital Stock, \$1,000.	
	Tax five mills	5.00
		<hr/> 130.00

Cr.

	By settlement of Aug. 10, 1899.	
	Superseded as per papers.....	125.00
	Herewith filed	5.00

Cr.

	By payment Oct. 9, 1905.....	5.00
	Due Commonwealth	\$
	Account balanced.	

Make payment to order of State Treasurer and mail copy of settlement to him with your remittance.

This amount is due and payable thirty days after State Treasurer's approval, and bears interest at the rate of 12 percentum from that date.

Auditor General's Department.

HARRISBURG, PA., Oct. 9, 1905.

Settled and entered.

N. E. HAUSE, For W. P. SNYDER,
Auditor General.

Treasury Department.

HARRISBURG, PA., Oct. 9, 1905.

Approved.

JOHN E. STOLL, For W. L. MATHUES,
State Treasurer.

Auditor General's Department.

HARRISBURG, PA., Oct. 11, 1905.

I hereby certify that the above is a true copy of the original remaining on file in this department.

279 Witness my hand and seal of office the day and year
aforesaid.

J. N. LANGHAM,
For W. P. SNYDER,
Auditor General.

Boyd Lee Spahr, Att'y, 1242 Land Title, Phila., Pa.

(Endorsed: C. P. No. 1. June, 1901. No. 3588. Cresson & Clearfield Coal & Coke Co. vs. International Coal Mining Co. 190. Box. Tax on Capital Stock. Account of the International Coal Mining Company. Certificate of Auditor General and State Treasurer of full payment of taxes due the Commonwealth according to Sec. 32, Act of June 1, 1899, P. L. 437. Filed Oct. 12, 1905. Boyd, Pro Prothy.)

Certificate of Record.

COMMONWEALTH OF PENNSYLVANIA,
Philadelphia County, ss:

I Craig Biddle, Prothonotary of the Court of Common Pleas No. 1 in and for said county, certify that the foregoing is a full and correct copy of the whole record of the case herein stated, wherein Cresson & Clearfield Coal & Coke Co., plaintiff, and International Coal Mining Co., defendant, as the same remains of record before the said Court, at No. 3588 of June Term, A. D. 1901.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, the 23rd day of April, A. D. 1907.

[SEAL.]

JOHN L. BURNS,
Pro Prothonotary.

Costs of Exemplification \$7.50.

280 (Endorsed: C. C. U. S. E. D. of Pa. 69, Ap. Sess., 1904. International Coal Mining Co. vs. Penna. R. R. Co. Cresson & Clearfield Coal & Coke Co. vs. International Coal Mining Co. Exemplification of record from C. P. No. 1 of Philadelphia Co., Pa. Filed Apr. 24, 1907. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

Petition of Edward D. McLoughlin, Trustee in Bankruptcy of the International Coal Mining Company under the Act of July 20th, 1892, Chapter 209, 27 Stat., 252, Fed. Statutes Annotated, Vol. 2, Page 294.

To the Honorable the Judges of the said Court:

The petition of Edward D. McLoughlin, Trustee in Bankruptcy for the International Coal Mining Company, respectfully shows:

1. That your petitioner, the said Edward D. McLoughlin, Trustee in Bankruptcy of the International Coal Mining Company, is a citi-

zen of the State of Pennsylvania and of the United States and is resident in the Eastern District of Pennsylvania.

2. Your petitioner by leave of Court has intervened as a plaintiff in the following causes pending in this Honorable Court, viz., International Coal Mining Company vs. Pennsylvania Railroad Company to April Sessions, 1904, No. 69, International Coal Mining Company vs. Pennsylvania Railroad Company, April Sessions, 1905, No. 25.

281 3. Your petitioner further shows that the said International Coal Mining Company has no assets further than the above-mentioned suits and other suits against the Pennsylvania Railroad Company, with the exception of the sum of \$274.45, Two hundred and seventy-four dollars and forty-five cents cash in the hands of your petitioner as such Trustee in Bankruptcy, and your petitioner further avers that he has no method of getting further money for the continuance by him as Trustee in Bankruptcy of the suits above mentioned now pending in this Court.

4. Your petitioner further avers that these causes are set for trial November 12th, 1907, and that many witnesses are being served with subpoenas for the trial by the advice of your petitioner's counsel James W. M. Newlin, Esq., who advised your petitioner that the attendance of these witnesses is necessary.

5. Your petitioner further avers that many of these witnesses are officers, or directors, or employes of the defendant the Pennsylvania Railroad Company, and that the other witnesses as a class and with very few exceptions, consist of the officers of coal companies who are claimed by the plaintiff and by your petitioner as intervenor to have received rebates from the Pennsylvania Railroad Company.

6. Your petitioner further shows that he is advised by counsel and knows of his own knowledge as a fact that it will be impossible to prosecute the aforesaid suits against the Pennsylvania Railroad Company if your petitioner is obliged to pay witness fees and mileage, and that the fund in hand, if all used for that purpose, would not pay the witness fee and mileage of all necessary witnesses, but on the contrary would leave a deficiency and either some would have to be paid and others not, or there would have to be part payments paid, and in either event the witness not paid in full in advance would claim exemption from the subpoena.

282 Your petitioner further shows to the Court that this very contingency is provided for by the Act of Congress of July 20th, 1892, above referred to, and your petitioner prays for the benefit of the said Act.

7. Your petitioner is advised by counsel that under the provisions of the said Act he is entitled to be relieved from the payment of all statutory fees and costs which will include witness fees and mileage, but that the small fund in hand must be kept intact for such necessary disbursements as are not fees and costs imposed by statute, such as paying process servers, paying stenographer and printer, and other expenses that cannot be anticipated, and your petitioner is advised by counsel and knows of his own knowledge by reason of the nature of the cases and the evidence that is likely to be taken upon the trial

with the whole fund in hand will probably not pay for the plaintiff's copy of the stenographer's notes of testimony.

8. Your petitioner further shows that all of the witnesses being subpoenaed who are officers, directors or employes of the Pennsylvania Railroad Company, are demanding payment of their witness fees in advance, and some of the private corporation officials are doing the same thing, but not all of them, and that in the case of the Railroad Company, as to officers, directors and employes, with a single exception, there has been a concert of action in this regard.

Your petitioner further avers that because of your petitioner's poverty in his official capacity of Trustee in Bankruptcy of the International Coal Mining Company, he is unable to prepay fees and costs or to give security therefor, and that he is unable to make further payments for witness fees or mileage, and your petitioner avers that he believes that he is entitled to the redress he seeks by the said suits against the Pennsylvania Railroad Company, and he sets forth therein briefly the nature of the said causes of action as follows, to wit, viz: Your petitioner avers that they were suits that were brought by the International Coal Mining Company against the Pennsylvania Railroad Company for damages for discriminating freight charges, which suits were pending at the time the International Coal Mining Company was put into bankruptcy, and are still pending and are being conducted by your petitioner under the order of this Honorable Court and of the Court in Bankruptcy.

And your petitioner will ever pray, etc.

EDW. D. McLOUGHLIN,
*Trustee in Bankruptcy of International
Coal Mining Company.*

JAMES W. M. NEWLIN,
For Petitioner.

STATE OF PENNSYLVANIA,
Eastern District, ss:

Edward D. McLoughlin, Trustee in Bankruptcy of the International Coal Mining Company, the petitioner above named, being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition are true and that he is advised by counsel that he is entitled to the relief above prayed.

EDW. D. McLOUGHLIN.

Sworn and subscribed to before me this twenty-fifth day of October, A. D. 1907.

[SEAL.]

LOVETT FRESCOLN,
Notary Public.

Commission expires January 3rd, 1909.

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Decree.

And now, October —, 1907, on presentation of the foregoing petition by James W. M. Newlin, attorney for the petitioner, Edward D. McLoughlin, Trustee in Bankruptcy of the International Coal

Mining Company, the said petition is ordered to be filed and the prayer of the said petition is hereby granted.

(Endorsed: 69. April Sessions, 1904. 25 April Sessions, 1905. C. C. U. S. E. D. Penna. Petition of Edward D. McLoughlin, Trustee in Bankruptcy of the International Coal Mining Company, under Act of July 20th, 1892, and order thereon. And now, Oct. 28th, 1907, the prayer of this petition is refused. By the Court. James B. Holland. Newlin. Filed Oct. 28, 1907. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Before Holland, J.

And now, April 1st, 1908, on motion of James W. M. Newlin, for plaintiff, and filing the accompanying petition of the plaintiff under Section Seven hundred and twenty-four (724) of the Revised

Statutes of the United States, The Court grant- a rule upon 285 the defendant to show cause why the defendant should not produce upon the trial of this cause the documentary evidence specified in said plaintiff's petition.

Returnable the 13th day of April, 1908, at 10 o'clock a. m.

BY THE COURT.

Attest:

GEORGE BRODBECK,

Deputy Clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

To the Honorable the Judges of the said Court:

The petition of The International Coal Mining Company Respectfully Shows:

1. From April 1st, 1894, to April 1st, 1901, the plaintiff was engaged in shipping bituminous coal by way of the defendant, the

Pennsylvania Railroad Company from the Clearfield Region in Pennsylvania to the points of delivery beyond the State of Pennsylvania set forth in detail in schedule "A" attached to the plaintiff's statement filed in this cause and which schedule your petitioner prays may be taken as a part of this petition.

286 2. Your petitioner further avers concerning its own shipments set forth in said schedule "A" attached to the plaintiff's statement filed in this cause that as these shipments were made your petitioner (following a custom which existed between your petitioner and the defendant, and also between all other similar shippers and the defendant) from time to time, generally monthly, presented a statement to the defendant setting forth the plaintiff's shipments in detail, giving car numbers, numbers of tons of coal and shipping points and destination points and freight collected by defendant from the consignees for account of your petitioner, and sometimes claiming a fixed rebate and at other times leaving that to be settled by a bargain made from time to time with J. G. Searles, Coal Freight Agent of the Pennsylvania Railroad Company, and Oscar A. Knipe, Auditor of Freight Receipts of the defendant. At the time these statements of the petitioner were handed in to the defendant, the defendant had already in its own possession the same information, and the clerks of the Railroad Company compared your petitioner's statements with the Railroad Company's own accounts and if they agreed, or were made to agree by mutual adjustment, the Auditor of Coal Freight Receipts fixed the amount of the rebate and the same was paid by the defendant to the plaintiff by check to J. G. Searles, Coal Freight Agent. A part of the documentary evidence of these transactions consisted of letters, from the Coal Freight Agent's Department to the Department of Auditor of Coal Freight Receipts, of which press copies were kept by the defendant and which accompanied the statements to the accounting department and the coal freight agent's department also kept a press copy of a memorandum of a slip that accompanied a check for the rebate when it was sent to the petitioner and the entire transaction was evidenced by a book or books and other writings, and the rebate check was drawn for the amount appearing on these books and writings and

287 was signed by either the Auditor of Coal Freight Receipts or by some other person for the Railroad Company and was then countersigned by J. G. Searles, Coal Freight Agent, and was then given to your petitioner. In this matter in addition to the statements of shipments made by your petitioner to the defendant and the same evidence in the hands of the Railroad Company the rebates thus paid were evidenced by other documentary proof which applied both to your petitioner and other like shippers, viz:

a. Written communication between the coal freight agent and the auditor of coal freight receipts, copies of which the defendant kept in letter books.

b. The checks for the rebates paid to your petitioner and to other like shippers. These checks were countersigned by the comptroller, the auditor of coal freight receipts and the coal freight agent, and each of these departments kept a permanent record of these checks

which came back to the Railroad Company after payment, and the stubs of the check books furnish further information in regard thereto so that the shipments made by the plaintiff specified in schedule "A" attached to the plaintiff's statement filed in this cause, and all of the transactions concerning the payment of rebates thereon as above set forth can all be traced through documentary evidence in the hands of the defendant.

3. Your petitioner further avers that all the papers above mentioned concerning your petitioner's shipments and the rebates allowed thereon by the defendant and the claims for rebates refused thereon since April 1st, 1899, are in the possession of the defendant and are pertinent to the issue between your petitioner and the said Pennsylvania Railroad Company, defendant in this case, and that it

is necessary for the benefit of the plaintiff that the same be
288 produced on the trial of this cause, and your petitioner prays that an additional rule to show cause why the said documentary evidence should not be produced upon the trial by the defendant may be granted under the provisions of Section Seven hundred and twenty-four (724) of the Revised Statutes of the United States.

4. Your petitioner further avers that the issues raised in this present cause in this Honorable Court between your petitioner and the defendant to No. 69, April Term, 1904, under the Interstate Commerce Act are the identical issues which are raised in another action pending in this Honorable Court between your petitioner and the said defendant herein, the Pennsylvania Railroad Company, but brought under the Sherman Anti-Trust Act, and your petitioner further avers that by an order of this Honorable Court made in said last mentioned case, viz., 25, April Term, 1905, which order was made October 28th, 1907, on rules to produce documentary evidence granted May 10th, 1907, and June 19, 1907, it is res adjudicata in this present cause between the same parties to April Term, 1904, No. 69, that the Pennsylvania Railroad Company defendant, has in its possession the documentary evidence called for in this petition and that the same is pertinent to the issue in both causes.

And your petitioner will ever pray, etc.

INTERNATIONAL COAL MINING COMPANY,

By J. CHESTER WILSON, *Secretary.*

JAMES W. M. NEWLIN,
For Petitioner.

289 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

J. Chester Wilson, being duly sworn according to law, deposes and says that he is the Secretary of the above named petitioner and that the facts set forth in the foregoing petition for a rule to produce documentary evidence are true.

J. CHESTER WILSON.

Sworn to and subscribed before me this 1st day of April, 1908. Interlineation on page 2 sixth line from bottom first made.

[SEAL.] HENRY B. ROBB,
*Clerk Circuit Court of the United
States, Eastern District of Penna.*

(Endorsed: No. 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Co. vs. Pennsylvania Railroad Company. Plaintiff's additional petition for rule on defendant to produce documentary evidence under Section 724 of the U. S. Revised Statutes, and rule to show cause granted thereunder. Newlin. Filed, Apr. 1, 1908. Henry B. Robb, Clerk. By L. Deputy Clerk.)

290 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

And now this first day of April, A. D. 1908, the plaintiff by leave of the Court files the following sur-rejoinder to the defendant's rejoinder to the plaintiff's replications; the plaintiff says that it is not prevented from proceeding with this action because of the matter set forth in the said rejoinder of the defendant, and the plaintiff further says that under the judgment held by the Cresson and Clearfield Coal and Coke Company against the International Coal Mining Company, (the plaintiff herein), in the Court of Common Pleas No. 1 of Philadelphia County, to June Term, 1901, No. 3588, the said Cresson and Clearfield Coal and Coke Company issued on October 24, 1903, an attachment execution and made the defendant herein the Pennsylvania Railroad Company garnishee and the plaintiff says that said attachment execution was served on the said garnishee October 24, 1903, and that at the time the said attachment was served upon the defendant herein, the Pennsylvania Railroad Company as such garnishee, the said garnishee had in its possession moneys belonging to the said International Coal Mining Company, the plaintiff herein and defendant in the judgment of the Cresson and Clearfield Coal and Coke Company, and that said moneys then amounted and have continuously amounted to many thousands of dollars in excess of the debt, interest and costs due upon

291 the judgment of the Cresson & Clearfield Coal and Coke Company, and that it was the duty of the said garnishee to pay said judgment thereout, but nevertheless the said Pennsylvania Railroad Company entered into a conspiracy with the said Cresson and Clearfield Coal and Coke Company and the said P. H. Walls, who was an officer of this Company, by which it was agreed that the said Cresson and Clearfield Coal and Coke Company should sell the suits of the International Coal Mining Company against the Pennsylvania Railroad Company, and that said P. H. Walls should buy the same

and should then in consideration of the money due to the Cresson and Clearfield Coal and Coke Company upon said judgment execute a full satisfaction adjustment and accord of any and every claim or demand of the International Coal Mining Company and that in pursuance of this conspiracy the said Pennsylvania Railroad Company paid to the said P. H. Walls the sum of \$953.95 out of the moneys in the hands of the Pennsylvania Railroad Company as garnishee and belonging to the International Coal Mining Company, and the said Pennsylvania Railroad Company in further pursuance of this conspiracy paid the expenses of the Cresson and Clearfield Coal and Coke Company intervening in the bankruptcy proceedings against the International Coal Mining Company as a creditor at a time when it had ceased to be a creditor of the International Coal Mining Company, and the plaintiff further says that by reason of these facts the Pennsylvania Railroad Company was in law and in fact owner of the judgment of the Cresson and Clearfield Coal and Coke Company at the time of the alleged sale to Walls, and that the judgment itself was by operation of law paid by the International Coal Mining Company through the Pennsylvania Railroad Company out of the moneys of the International Coal Mining Company in the hands of the Pennsylvania Railroad Company, which thus sought to cheat the International Coal Mining Company out of its

292 claims against the Pennsylvania Railroad Company by using the money in its hands belonging to the International Coal Mining Company to procure this fraudulent satisfaction through Walls, and that the said Pennsylvania Railroad Company is estopped from setting up this pretended satisfaction thus obtained by its own fraud, and the concurrence of said fraud by the said Walls in the said Cresson and Clearfield Coal and Coke Company.

And this the plaintiff prays may be inquired of by the country.

JAMES W. M. NEWLIN,

For Plaintiff.

(Endorsed: No. 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Company vs. Pennsylvania Railroad Company, Plaintiff's surrejoinder to defendant's rejoinder to plaintiff's replications filed by leave of Court. Before Holland, J. By the Court. Attest: George Brodbeck, Deputy Clerk. Newlin. Filed Apr. 1, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

293 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

The Clerk will enter a rule on the defendant to file rebutter to plaintiff's surrejoinder within 15 days or judgment, sec. leg.

JAMES W. M. NEWLIN,

For Plaintiff.

April 1, 1908.

To Henry B. Robb, Esq., Clerk Circuit Court United States.

(Endorsed: No. 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Co. vs. Pennsylvania Railroad Company. Rule to file rebutter. Newlin. Filed April 1, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

294 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

And now April 13th, 1908, comes the plaintiff by James W. M. Newlin, its attorney, and moves that the rule granted April 1st, 1908, returnable April 13th, 1908, be made absolute.

JAMES W. M. NEWLIN,
Attorney for Plaintiff.

(Endorsed: No. 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Co. vs. Pennsylvania Railroad Co. Plaintiff's motion to make absolute rule to produce, returnable April 13th, 1908. Newlin. Filed Apr. 13, 1908. Henry B. Robb, Clerk. Per B.)

295 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Sur rule on defendant, granted April 1st, 1908, to show cause why it should not be required to produce upon the trial certain papers and writings.

The Pennsylvania Railroad Company, the defendant in the above-entitled action, answering the rule to show cause why it should not produce upon the trial of the cause, the papers and writings referred to in the petition of the plaintiff, upon which said rule was granted, says:

1. It respectfully suggests to the Court that the plaintiff is not entitled to the order sought by it because of the facts averred and set forth in the third plea by this respondent.

2. It suggests, and respectfully submits to the Court, that no warrant exists under the statutes of the United States, for the making of any such order as is sought by the plaintiff in an action of the character of the present one, which is an action to recover damages in

the nature of penalties claimed to be due because of alleged violations of the Acts of Congress known as the Interstate Commerce Acts.

3. Without waiving either of the aforesaid objections, but, on the contrary, insisting upon the same, the defendant, further answering the rule to show cause, says: That it has in its possession 296 letter-press books and accompanying statements of the character referred to in the petition of the plaintiff, upon which said rule was granted, which were sent by its Coal Freight Agent to its Auditor of Coal Freight Receipts during the period named in the said petition, and has also press copies of the memorandum slips which accompanied the checks sent in payment of amounts due as per said letters and statements (such slips in each case showing the amount of the check), covering or relating to settlements made with the plaintiff and with other shippers. It has not in its possession the checks themselves, nor the stubs of the same, nor the statements furnished by the plaintiffs and other shippers, these not having been preserved.

THE PENNSYLVANIA RAILROAD
COMPANY,

By JNO. P. GREEN, *Vice-President.*

Attest:

ROB'T H. GROFF,

[SEAL.]

Ass't Secretary.

STATE OF PENNSYLVANIA,

City and County of Philadelphia, ss:

Rob't H. Groff, being duly sworn, deposes and says that he is the Assistant Secretary of The Pennsylvania Railroad Company, the defendant above named, and that he was advised by counsel that the averments of the above answer are true.

ROB'T H. GROFF.

Sworn and subscribed before me this 11th day of April, A. D. 1908.

C. M. GREER,

[SEAL.]

Notary Public.

Commission expires January 19th, 1911.

(Endorsed: No. 69. April Sessions, 1904. Circuit Court 297 of the United States. Eastern District of Pennsylvania. International Coal Mining Company vs. The Pennsylvania Railroad Company. Sur rule on defendant, granted April 1st, 1908, to show cause why it should not be required to produce upon the trial certain papers and writings. Filed Apr. 13, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of
Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

James W. M. Newlin, being duly sworn according to law, deposes and says that on April 1st, 1908, he mailed to Messrs. Sellers & Rhoads, attorneys for the defendant, a copy of the plaintiff's sur rejoinder to the defendant's rejoinder to the plaintiff's replications filed by leave of Court April 1st, 1908, and also upon the same day in the same cause deponent mailed to the said attorneys for the defendant a copy of a rule on the defendant to file rebutter to plaintiff's sur rejoinder within fifteen days or judgment, and deponent further says that since the rule expired, to wit, on April 17th and April 18th, 1908, deponent called attention of the defendant's attorneys to the failure to file rebutter.

JAMES W. M. NEWLIN.

Sworn to and subscribed before the undersigned this 20th day of
April, 1908.

LEO A. LILLY,
Deputy Clerk.

[SEAL.]

298 (Endorsed: No. 69. April Sessions, 1904. C. C. U. S.
E. D. Penna. International Coal Mining Company vs. Penn-
sylvania Railroad Company. Affidavit of service of rule to file
rebutter. Filed Apr. 20, 1908. Henry B. Robb, Clerk. By L.
Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of
Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Enter judgment against the defendant on the plaintiff's sur re-
joinder for want of a rebutter.

JAMES W. M. NEWLIN.

April 20th, 1908.

To Henry B. Robb, Esq., Clerk C. C. U. S.

(Endorsed: No. 69. April Sessions, 1904. C. C. U. S. E. D.
Penna. International Coal Mining Company vs. Pennsylvania Rail-
road Company. Order for judgment on sur rejoinder. Newlin.
Filed Apr. 20, 1908. Henry B. Robb, Clerk. By L., Deputy
Clerk.)

299 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Before Holland, J.

And now, April 22nd, 1908, comes the plaintiff by James W. M. Newlin, its attorney, and moves the Court to grant a rule on the defendant to show cause why the plaintiff should not have leave to amend the last paragraph of the first count of the plaintiff's statement by striking out the figures "\$37,268.85" and inserting in lieu thereof the figures "\$150,000."

JAMES W. M. NEWLIN,
For Plaintiff.

Rule to show cause granted, returnable April 24th, 1908, at 10 a. m.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

(Endorsed: No. 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Company vs. Pennsylvania Railroad Company. Rule to show cause why plaintiff's first count should not be amended by making the claim \$150,000. Newlin. Filed Apr. 22, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

300 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

The defendant demurs to the plaintiff's sur rejoinder, filed April 1st, 1908, and assigns the following reasons therefor:

1. Because the sur rejoinder neither traverses the facts set forth in the defendant's rejoinder, nor sets up any new matter or things legally sufficient to avoid the effect of such facts and matters.

SELLERS & RHOADS,
Counsel for Defendant.

We do hereby certify that, in our opinion, this demurrer is well founded in point of law, and further, that the same is not interposed for purposes of delay.

SELLERS & RHOADS,
For Defendant.

Robert H. Groff, being duly sworn according to law, deposes and says: I am the Assistant Secretary of the Pennsylvania Railroad Company, the defendant in this action. The foregoing demurrer is not interposed for purposes of delay.

ROBT H. GROFF.

Sworn and subscribed to before me this twentieth day of April, 1908.

[SEAL.]

C. M. GREER,
Notary Public.

Commission expires January 19th, 1911.

301 (Endorsed: No. 69. April Sessions, 1908. Circuit Court Eastern District of Pennsylvania. International Coal Mining Company vs. The Pennsylvania Railroad Company. Demurrer of defendant to plaintiff's sur rejoinder. Filed Apr. 24, 1908. Henry B. Robb, Clerk. L.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
VS.
PENNSYLVANIA RAILROAD COMPANY.

The Pennsylvania Railroad Company, the defendant in the above entitled action, prays the Court to open the judgment entered against it in said action for want of a rebutter to the plaintiff's sur-rejoinder, for the following reasons:

The said sur-rejoinder, as your petitioner is advised by counsel, and therefore avers, neither traversed the facts set forth in the defendant's rejoinder, nor set up any new matter or thing legally sufficient to avoid the effect of the averments of the said rejoinder. For this reason your petitioner respectfully submits that the plaintiff was not entitled to judgment for failure on its part to file a rebutter.

Your petitioner further states and shows to the Court that on the 20th instant a demurrer to the said sur-rejoinder was prepared and executed by it, and sent to its counsel of record in this case for filing.

302 That it then learned that judgment had been entered for want of a rebutter, and its counsel consequently withheld the filing of the demurrer. That except for an inadvertent omission on the part of those charged with the preparation of the demurrer, who were not, however, the counsel of record in the case,

this demurrer would have been filed on or before the expiration of the time within which a rebutter should have been filed under the rule to file the same entered by the plaintiff.

Wherefore your petitioner prays that a rule may be granted upon the plaintiff to show cause why the said judgment should not be opened.

And it will ever pray, etc.

THE PENNSYLVANIA RAILROAD COMPANY,
By JNO. P. GREEN,
Vice-President.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Robt. H. Groff, being duly sworn according to law, deposes and says: I am the Assistant Secretary of the Pennsylvania Railroad Company, the petitioner above named. The facts set forth in the foregoing petition are true to the best of my knowledge and belief.

ROBT. H. GROFF.

Sworn and subscribed to before me this 24th day of April, 1908.
[SEAL.] LEWIS NEILSON,

Notary Public.

Commission expires 26 February, 1909.

(Endorsed: No. 69. April Sessions, 1904. Circuit Court of the U. S. Eastern District of Pennsylvania. International Coal Mining Co. vs. Pennsylvania Railroad Company. Petition for rule to show cause why judgment entered for failure of defendant to file rebutter should not be opened. Sellers & Rhoads. Filed Apr. 24, 1908. Henry B. Robb, Clerk. L.)

303 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Sur Rule to Show Cause Why Plaintiff Should Not Have Leave to Amend its Statement of Claim.

The Pennsylvania Railroad Company, the defendant in the above entitled action, answering said rule, respectfully submits to the Court that the plaintiff has failed to allege or show any reason why it should now be permitted to so amend its statement of claim as to increase the amount for which it has brought its action from \$39,268.85 to the sum of \$150,000.00.

The defendant further submits that this amendment should not be allowed for the reason that, if permitted, the plaintiff's demand would be materially increased, and in this connection calls attention to the fact that more than six years have elapsed since the date of the last shipment embraced in the action.

THE PENNSYLVANIA RAILROAD COMPANY,
By JNO. B. GREEN,
Vice-President.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Robert H. Groff, being duly sworn according to law, deposes and says: I am the Secretary of The Pennsylvania Railroad Company, the defendant in the above entitled action. The facts set forth in the foregoing answer are true to the best of my knowledge and belief.

ROBT. H. GROFF.

Sworn and subscribed to before me this 24th day of April, A. D. 1908.

[SEAL.]

LEWIS NEILSON,
Notary Public.

Commission expires 26 February, 1909.

(Endorsed: No. 69. April Sessions, 1904. Circuit Court of the U. S. Eastern District of Pennsylvania. International Coal Mining Company vs. The Pennsylvania Railroad Company. Answer of defendant to rule to show cause why plaintiff should not have leave to amend its statement of claim. Sellers & Rhoads. Filed Apr. 24, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Answer of Plaintiff to the Petition of the Defendant Prying for the Opening of Judgment by Default for Want of a Rebutter.

To the Honorable the Judges of the said Court:

The answer of the plaintiff respectfully shows:

305 1. That plaintiff is advised by counsel and therefore avers that the following statement made in the defendant's petition is not true, viz:

"The said sur-rejoinder, as your petitioner is advised by counsel, and therefore avers, neither traversed the facts set forth in the de-

defendant's rejoinder, nor set up any new matter or thing legally sufficient to avoid the effect of the averments of the said rejoinder. For this reason your petitioner respectfully submits that the plaintiff was not entitled to judgment for failure on its part to file a rebutter."

2. Plaintiff further avers that as to the following statement in the defendant's petition:

"That except for an inadvertent omission on the part of those charged with the preparation of the demurrer, who were not, however, the counsel of record in the case, the demurrer would have been filed on or before the expiration of the time within which a rebutter should have been filed under the rule to file the same entered by the plaintiff."

The plaintiff avers that the counsel of record in this cause, Messrs. Sellers & Rhoads, have taken no active part in the cause and that everything which has been done has been done under the direct control of Mr. Francis I. Gowen, and on information and belief the plaintiff avers that the said Francis I. Gowen is the person who prepared the demurrer referred to and the plaintiff believes and expects to be able to prove as to all the frauds alleged by the plaintiff in its replication and in its sur-rejoinder, that they were suggested to the said defendant by the said Francis I. Gowen, and were carried out in every respect by his advice and under his direction and that there would be no merit in relieving either the Company or himself from the default judgment for want of a rebutter.

306 In this connection plaintiff further avers that the petition of the defendant to open the default judgment entered April 20th, 1908, was not presented to the Court until April 24th, 1908, and plaintiff is advised by counsel that no rule thereunder was granted by the Court.

The plaintiff further avers that the same day, to wit: April 24th, 1908, notice was duly served upon the defendant's counsel of record that depositions against the plaintiff's petition would be taken before the Clerk of the Court at 11 a. m. on Monday, April 24th, 1908, and that the said Francis I. Gowen and Robert H. Groff, assistant secretary of the defendant, were subpoenaed to attend as witnesses for the plaintiff, and they did attend as witnesses for the plaintiff before the Clerk at 11 a. m. Monday, April 27, 1908, and insisted on leaving the Clerk's office and did leave the Clerk's office at 11.08, because plaintiff's counsel was not present. Plaintiff's counsel did appear before the Clerk at 11.15 on the same day and was sworn as a witness to testify that the delay in his reaching the Clerk's office was caused by the obstruction of traffic by a circus procession, and he then gave notice that he would take the depositions at the bar of the Court on the trial of the cause.

3. Plaintiff is further advised by counsel, and therefore avers, that if all the statements contained in the defendant's petition to open default judgment were true the Court is without jurisdiction to grant the relief prayed for.

4. "The question covered by the default judgment is *res adjudicata* against defendant.

In *International Coal Mining Company vs. Pennsylvania R. R.*

Co., April Sessions, 1905, No. 25, the defendant by special plea raised the question of the validity of the Walls sale, and in that case (the parties and the issue being the same as in the case at bar) it is res adjudicata.

307 (a) That as matter of law no title passed by the attempted sale of the cause of action to Walls.

(b) In No. 25, the pleadings raised the question that the sale was void for fraud.

On this issue judgment by default was entered April 15, 1907, for failure to rejoin to plaintiff's replication.

On May 15, 1907, the default was stricken off and judgment was then entered for plaintiff on defendant's plea May 22, 1907, the order of Court, made May 15, 1907, was rescinded "and the entry of judgment by default entered April 15, 1907, is amended so as to read as follows: Judgment accordingly by default against the defendant for failure to file rejoinder to the plaintiff's several replications without prejudice to a trial of the cause under the pleas filed July 11, 1905.

NOTE.—These pleas were "Not Guilty" and "Statute of Limitations."

5. Plaintiff further shows that it is advised by counsel that an application has been made to the Court to set aside the service of the subpoena mentioned in paragraph 2 of this answer, and plaintiff is further advised by counsel that it is not clear from defendant's petition whether the service is sought to be set aside as to the rule to amend, and the defendant's petition to take off the default, the petition is headed "sur rule to amend statement of claim," and plaintiff is further advised by counsel that even if the rule to amend and the petition to open the default are both to be heard, the trial of the cause on the 29th inst. it would be in order to take depositions in advance of trial upon the questions raised.

INTERNATIONAL COAL MINING COMPANY,

[SEAL.] By J. CHESTER WILSON, *Secretary*,

JAMES W. M. NEWLIN,

For Respondent.

308 STATE OF PENNSYLVANIA.

City of Philadelphia, ss:

J. Chester Wilson, being duly sworn according to law, deposes and says that he is the Secretary of the above named respondent, the International Coal Mining Company, and that the facts set forth in the foregoing answer are true.

J. CHESTER WILSON.

Sworn and subscribed to before me this 28th day of April, 1908.

[SEAL.]

BENJ. H. RENSHAW,

Notary Public.

Commission expires February 13, 1909.

(Endorsed: No. 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Company vs. Pennsylvania Railroad Company. Answer of plaintiff to the petition of defendant to open default judgment for want or a rebutter. Filed April 28, 1908. Henry B. Robb, Clerk. L. Newlin. Filed April 28, 1908. Henry B. Robb, Clerk)

309 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Sur Rule to Amend Statement of Claim. Petition to Set Aside Service of Subpoena.

The Pennsylvania Railroad Company, the defendant in the above entitled action, respectfully represents that on the 22nd instant this Honorable Court granted a rule upon the defendant, returnable the 24th instant, to show cause why plaintiff should not have leave to amend the last paragraph of the first count of its statement, by striking out the figures \$37,268.85, and inserting in lieu thereof, the figures \$150,000.

That upon the return day of said rule the defendant filed an answer denying the right of the plaintiff to amend because of the fact that, as appears from its statement of claim, more than six years had elapsed from the date of the last of its shipments.

That, notwithstanding the fact that the issue raised by the answer is purely one of law, and there are, consequently, no facts at issue under the plaintiff's said rule to show cause, the plaintiff has caused to be issued a subpoena, and has served the same upon Robert H. Groff and Francis I. Gowen, and has endeavored to serve the same, as your petitioner is advised, upon John P. Green.

That by the mandate of the subpoena those who have been
310 served are required to appear before the Clerk of this Court at 11 a. m. to-day, to testify sur rule to amend statement, and also sur defendant's petition for rule to strike off default judgment for want of a rebutter.

That while a petition has been presented by this defendant for rule to open the judgment entered by the plaintiff for want of a rebutter, no rule to show cause has been granted thereon, as the Court stated upon the presentation of said petition that it would consider the same when the case was called for trial on the 29th instant.

Your petitioner is advised, and therefore avers that, under the circumstances, the issuance and service of the subpoena aforesaid was unauthorized, and it accordingly prays that the service of the

same may be set aside, and that the subpoena may be returned to the Clerk of this Court.

And it will ever pray, etc.,

THE PENNSYLVANIA RAILROAD COMPANY,
By ROBT. H. GROFF, *Ass't Secretary*.

STATE OF PENNSYLVANIA,

City and County of Philadelphia, ss:

Robert H. Groff, being duly sworn according to law, deposes and says: I am the Assistant Secretary of The Pennsylvania Railroad Company, the petitioner above named. The facts set forth in the foregoing petition are true to the best of my knowledge and belief.

ROBT. H. GROFF.

Sworn and subscribed before me this 27th day of April, 1908.

[SEAL.]

C. M. GREER,

Notary Public.

Commission expires January 19th, 1911.

311 And now, April 27, 1908, upon motion of counsel for the defendant, it is ordered that the service of the subpoena referred to in the above petition be set aside, that the subpoena be returned to the Clerk of the Court, and that all proceedings thereunder be stayed.

BY THE COURT.

(Endorsed: No. 69. April Sess., 1904. Circuit Court, U. S., Eastern Dist., Pa. International Coal Mining Co. vs. The Pennsylvania R. R. Co. Sur Rule to Amend Statement of Claim. Petition to Set Aside Service of Subpoena. Filed Apr. 29, 1908. Henry B. Robb, Clerk. L.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Sur Petition of the Defendant for Rule to Show Cause Why Judgment Entered for Failure of Defendant to File a Rebuttal Should Not Be Opened.

Before Henry B. Robb, Esq., Clerk of the Court, Monday, April 27, 1908, 11 a m.

The clerk states that he was attended at his office at 11 o'clock a. m. by Francis I. Gowen, Esq., and Edwin J. Sellers, Esq., of counsel for the Pennsylvania Railroad Company, and a witness.

312 After remaining until eight minutes after eleven Mr. Gowen stated that as Mr. Newlin had failed to appear, he would remain no longer, and accordingly left the office with Mr. Sellers and the witness. At 11.15 a. m. Mr. Newlin arrived at his office and Mr. Robb stated to him the facts as above set forth.

JAMES W. M. NEWLIN, having been duly sworn, testified as follows:

Mr. NEWLIN: I left my office at eighteen minutes of eleven to come here, and was unavoidably delayed by the circus parade. I received no message in regard to this hearing and did not know, until the clerk told me just now, that the persons representing the railroad company and the witness had gone away.

I now offer in evidence the notice on behalf of the plaintiff to the counsel of record.

I will further state that I am attorney for the plaintiff, and on Friday last, April 24, 1908, Mr. Sellers, for the defendant, served on me a petition on behalf of the Pennsylvania Railroad Company for a rule to show cause why judgment entered for failure to file a rebutter should not be opened. I immediately notified Mr. Sellers verbally, and the same day notified him by letter, that I would take depositions against this petition before the clerk of the court at eleven o'clock on Monday morning, April 27, 1908. In pursuance of this notice I had a subpoena made out for John P. Green, Vice-President of the Pennsylvania Railroad Company; Robert H. Groff, Assistant Secretary of the Pennsylvania Railroad Company; Francis I. Gowen, General Solicitor of the Pennsylvania Railroad Company, to appear at eleven o'clock a. m. to-day before the clerk and be examined in this cause sur plaintiff's petition for rule to strike off default judgment for want of a rebutter.

313 Mr. Newlin now offers in evidence the said subpoena and asks that the same be marked as an exhibit of plaintiff and attached to this record.

The said subpoena is marked "Plaintiff's Exhibit A, 4-27-08."

Mr. Newlin now calls Mr. William Querns as a witness.

WILLIAM QUERNS, having been duly sworn, was examined as follows:

By Mr. NEWLIN:

Q. I show you this subpoena which I have offered in evidence. Please state whether you served this subpoena, and if so, when and upon whom?

A. I served the subpoena upon Francis I. Gowen and Robert H. Groff at their offices in the Broad Street Station of the Pennsylvania Railroad Company.

Q. On what date?

A. On Saturday, April 25, 1908.

Q. About what hour?

A. I judge about eleven o'clock or quarter of eleven.

Mr. NEWLIN: As this cause is for trial on April 29, I will post-

pone the taking of these depositions and take them at the bar of the court against the allowance of any rule to show cause on the petition of the railroad company to take off the default judgment for want of a rebutter.

UNITED STATES,

Eastern District of Pennsylvania, set:

The President of the United States to John P. Green, Vice-President Penna. R. R.; Robert H. Groff, Ass't Sec'y Penna. R. R.; Francis I. Gowen, Gen'l Solicitor P. R. R., all Broad St. Station:

We command you, that laying aside all manner of business and excuses whatsoever, you personally be and appear before the
314 Clerk of the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, in the Third Circuit, in the City of Philadelphia, on the 27th day of April, A. D. 1908, at 11 o'clock, A. M., then and there to testify all and singular those matters and things which you shall know in a certain action now depending in the said Court, and undetermined, between International Coal Mining Company and Pennsylvania Railroad Company to April Sessions, 1904, No. 69, sur plaintiff's rule to amend statement and sur defendant's petition for rule to strike off default judgment for want of a rebutter. On the part of the said ———.

And hereof fail not under the penalty of Four Hundred Dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 24th day of April, A. D. 1908, and in the — year of the Independence of the United States.

[SEAL.]

LEO A. LILLY,

Deputy Clerk of the Circuit Court.

Served personally April 25th, 1908, on Francis I. Gowen, Robert H. Groff at their offices Broad Street Station.

(Endorsed: Circuit Court, April Session, 1904. 69. International Coal Mining Company vs. Pennsylvania Railroad Company. Subpoena to Testify. Returnable on the 27th day of April 1908. Exhibit "A." Henry B. Robb, Clerk. April 27, 1908. Newlin.)

(Endorsed: 69. Apr., 1904. International Coal Mining Co., v. Penna. R. Co. Depositions on behalf of plaintiff sur petition of defendant for rule to show cause why judgment for want of rebutter should not be stricken off. Filed May 4, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

315 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Sur Call under Order of April 2nd, 1907, to Produce, &c.

And now to wit, May 1st, 1908, Sellers & Rhoads of counsel for above defendant request the Clerk of the Court in whose custody the books, &c., produced under above call now are to permit the defendant, by its representatives, to examine its own records and books produced under call in such manner and at such times as will in no wise inconvenience the said plaintiff in its examination of said books, &c., by its representative, said examination to be made for the purpose of preparation for trial of the said cause on May 11th, 1908.

MAY 1, 1908.

The above request was objected to by counsel for plaintiff and is refused by the Clerk for the reason that under the order of Court the above books were placed in his custody for the sole purpose of examination by the plaintiff, and that he has no authority to enlarge the scope of the order.

H. B. R., *Clerk.*

Exception to defendant to ruling.

H. B. R.

316 Before Holland, J.

And now, to wit, this fourth day of May, 1908, it is ordered that the Clerk's ruling be overruled.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

(Endorsed: 69. April Sess., 1904. C. C. U. S. E. Dist. of Penna. International Coal Mining Company vs. Pennsylvania Railroad Company. Motion for privilege to examine books while in custody of Clerk, and Order of Court. Sellers & Rhoads, for Def't. Filed May 4, 1908. Henry B. Robb, Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Sur Order of April 2, 1907, for Production.

And now, May 1, 1908, Mr. Newlin, for the plaintiff requests the Clerk to mark with his initials and date and name of case, letter books, 58-61, part of bundle marked A.

MAY 1, 1908.

The Clerk is obliged to refuse the above request for the reason that the Court has already decided (upon the application of Mr. Sellers) that no "marks" can be put upon defendant's papers or documents until they are offered in evidence.

HENRY B. ROBB, *Clerk.*

Exception to plaintiff to ruling.

H. B. R.

Before Holland, J.

And now, to wit, this fourth day of May, 1908, it is ordered that the Clerk's ruling be approved.

BY THE COURT.

Attest:

GEORGE BRODBECK,

Deputy Clerk.

(Endorsed: 69. April Sessions, 1904. C. C., U. S., E. D. Penna. International Coal Mining Co. vs. Pennsylvania R. R. Co. Motion on behalf of P'tff to mark book, &c. P'tff's exception to ruling of Clerk on order to produce of April 2, 1907, and order of Court. Filed May 4, 1908. Henry B. Robb, Clerk.)

318 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY.

vs.

PENNSYLVANIA RAILROAD COMPANY.

To the Honorable the Judges of the said Court:

The petition of the International Coal Mining Company respectfully shows:

1. That after the appointment by the Court of the Audit Company to prepare tabulations from the letter books of James G. Searles, Coal Freight Agent, to Oscar A. Knipe, Auditor of Freight Receipts, heretofore produced by the defendant, under the order of April 2nd, 1907, counsel met at 1.15 p. m. to-day a representative of the Audit

Company, at which time certain methods of preparing schedules were agreed upon, and in answer to an inquiry from petitioner's counsel, the representative of the Audit Company says that after examining one of Mr. Searles' letters, that he could not report from these letters anything on the following subjects:

- (a) Whether the claim allowed had been paid.
- (b) What was the meaning of the subject of allowances, such as "terminal expenses," "unfilled contracts."
- (c) Tonnage.
- (d) Whether the rate mentioned, was a net rate from a tariff rate.

319 A representative of the Audit Company was then asked to make a report to the Court of these facts and also to report what auxiliary documentary evidence was necessary to determine the nature of the payment and the facts of payments.

The representative of the Audit Company declined so to do for lack of authority.

2. Your petitioner further shows that upon a report of the Audit Company coming in whilst tabulations will be made there will be no evidence before the Court on the lacking subjects mentioned in the preceding paragraphs, and that no evidence has been produced by the defendant as to the payments to the Berwind-White Coal Mining Company and other favored shippers mentioned in the plaintiff's statement, and made in any other way than through the Searles' allowances.

Petitioner further shows that in the petition for a rule to produce on which the order of April 2nd, 1907, was made, it is distinctly averred by the plaintiff that the defendant had in its possession documentary evidence showing the payments of rebates to the favored shippers, and this statement was not denied in the answer by the defendant, and your petitioner therefore asks that the Court make an order on the defendant to produce before the Clerk all the documentary evidence mentioned in the aforesaid petition on which the order of April 2nd, 1907, was made by which the rebates to said favored shippers were paid, whether through the department of the Coal Freight Agent or through any other department of the Pennsylvania Railroad Co.

3. Your petitioner further shows that the representative of the Audit Company, after reading the stenographer's notes of the order of the Court providing for the tabulating, on objection being raised by counsel for the Railroad Company to his tabulating shipments via

320 Greenwich Pier, for points beyond the Capes, he declined to include them in the tabulations unless the Court ordered him so to do, he was of the opinion that the order did not cover these shipments, because they were not in Schedule A attached to plaintiff's statement.

Your petitioner will ever pray, etc.

THE INTERNATIONAL COAL MINING
COMPANY,

By J. CHESTER WILSON, *Secretary*

JAMES W. M. NEWLIN,

For Petitioner.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

J. Chester Wilson, being duly sworn according to law, deposes and says that he is the Secretary of the International Coal Mining Company, the above named petitioner, and that the facts set forth in the foregoing petition are true.

J. CHESTER WILSON.

Sworn to and subscribed before me this 12th day of May, 1908.

[SEAL.]

BENJ. H. RENSHAW,
Notary Public.

Commission expires February 13, 1909.

Before Holland, J.

And now, to wit, this 13th day of May, 1908, it is ordered that a rule be granted on def't to show cause why the prayer of the within petition should not be granted. Returnable May 14, 1908, at 10 a. m.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

321 (Endorsed: 69. April Sessions, 1904. C. C. U. S., E. D. Penna. International Coal Mining Company vs. Pennsylvania Railroad Company. Petition for further order to produce on order of April 2nd, 1907, and order of Court granting Rule. Filed May 13, 1908. Henry B. Robb. By L., Deputy Clerk. Newlin.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania. April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Sur petition of plaintiff, filed this day, praying for an order upon defendant to produce certain books and papers, and directing the audit company, which has been appointed accountant under the order of the court of the 12th instant, to include in its report shipments made by the plaintiff via Greenwich pier to points beyond the Delaware capes.

Answer of the Pennsylvania Railroad Company.

This respondent, answering the averments of the plaintiff's petition, says:

That it is advised that it has not failed to produce any books or

322 papers which by any order of this Honorable Court it has been directed to produce at the trial of the cause.

This respondent is advised that an inspection of the record of the cause will disclose the following facts:

On February 19, 1906, the plaintiff obtained a rule on the defendant to show cause why certain books and papers should not be produced upon the trial of the cause, and in the petition upon which such rule was granted the plaintiff averred that the defendant had in its possession the claims presented by shippers which were delivered to the Coal Freight Agent of the Company, and which were used by him in determining the net or adjusted rates which should be charged on shipments embraced in these claims, and had also in its possession the checks which were subsequently sent to the shippers in settlement of the amounts due them because of the adjustments of rates authorized by the Freight Claim Agent, and the plaintiff, in its said petition of February 19, 1906, prayed that the defendant might be required to produce these statements and checks upon the trial of the cause.

To this petition this respondent filed an answer denying that it had in its possession the said statements and checks, but admitting that it had in its possession, and could therefore produce, the press copies of the letters of the Freight Claim Agent which authorized the adjustment of rates and which embodied the rates which the Freight Claim Agent authorized the application of to the shipments of the various shippers.

Subsequently the plaintiff, on January 30, 1907, presented a second petition for a rule to produce, and in this petition it again averred that the defendant had in its possession the papers and documents showing the payment of rebates to certain shippers, which papers and documents it described generally as in its previous petition, and then proceeded to aver, as this respondent is advised an inspection of the petition itself will disclose, that the papers 323 which it desired produced were of the same character as those which had been produced by this respondent upon the trial of another action brought by the plaintiff against it in the Court of Common Pleas No. 2, for the County of Philadelphia.

As this respondent had in its possession papers of this character, it did not in its answer deny the possession of the papers called for. Even if it were possible to give to the petition of January 30, 1907, any other construction than that above indicated, this respondent is advised that inasmuch as the record of the case will disclose a denial on its part of the possession of the statements and checks above alluded to, it was not obliged, as a matter of law, to reiterate its denial of its possession of these, it having already made this denial in response to the first petition filed by the plaintiff for an order requiring it to produce papers upon the trial of the cause.

That the plaintiff did not itself regard the petition of January 30, 1907, as covering any other papers than those of the character which were produced upon the trial of the case in the Court of Common Pleas No. 2 is evidenced by the fact that on April 1st, 1908, it presented a further petition for an order to produce books

and papers, and in and by this petition it asked for an order to produce, inter alia, the statements and checks which it now claims were covered by its petition of January 30, 1907.

To this petition this respondent filed an answer, in which it again averred that it had not in its possession the statements furnished by the plaintiffs and other shippers, nor the checks nor stubs of the same referred to in the petition, as these had not been preserved by it.

With reference to the prayer of the plaintiff that there should be included in the statement which is now in the course of preparation by the accountant appointed by this Honorable Court, the shipments made by it to Greenwich Pier, destined to points beyond the Delaware Capes, this respondent states and shows to the Court that these shipments are not included in the schedule attached to the plaintiff's statement of claim, nor could an amendment now be allowed which would permit the plaintiff to recover in respect to any of these shipments, for the following reasons:

(a) Because an entirely new cause of action would be thereby introduced, more than six years after the alleged cause of action had arisen.

(b) Because the shipments to Greenwich Pier, made by the plaintiff, destined to points beyond the Delaware Capes, were embraced in an action brought by the plaintiff against this respondent in the Court of Common Pleas No. 2, for the County of Philadelphia, to March Term, 1901, Number 362, and said action has since been tried and determined in favor of this respondent.

Wherefore this respondent submits that the order prayed for by the plaintiff should not be granted.

THE PENNSYLVANIA RAILROAD COMPANY,
By JNO. P. GREEN, *Vice-President*.

CITY AND COUNTY OF PHILADELPHIA,
State of Pennsylvania, ss:

Robert H. Groff, being duly sworn according to law, deposes and says that he is the Asst. Secretary of the Pennsylvania Railroad Company, and that the foregoing facts are true to the best of his knowledge and belief.

ROBT. H. GROFF.

Sworn and subscribed to before me this 13th day of May, A. D. 1908.

C. M. GREER.

[SEAL.]

Notary Public.

Commission expires January 19th, 1911.

325 (Endorsed: 69, April Term, 1904. C. C. U. S. E. D. Penna. International Coal Mining Co. vs. The Pennsylvania Railroad Co. Answer. Sur petition of plaintiff this day filed for order to produce books and papers; also to have included in accountant's report statement of plaintiff's shipments via Greenwich Pier to points beyond the Delaware Capes. Sellers & Rhoads, Francis I. Gowen, for Deft. Filed May 13, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

The plaintiff excepts to the rule to show cause of May 13, 1908, for the following reasons:

1. The petitioner asked for a peremptory order to produce within twenty-four hours shippers' statements of claims which by another peremptory order of April 2nd, 1907, the defendant had been required to produce on the trial.

The plaintiff submitted with its petition of May 13, 1908, a form of an order hereto appended, which the Court declined either to grant or refuse, which was in effect refusing to require the obedience of its own order of April 2nd, 1907.

2. Because the rule to show cause was not granted upon 326 the plaintiff's request, but was granted by the Court of its own motion.

3. Because the order of April 2nd, 1907, cannot be changed by the Court at this time and the Court must compel its obedience by the defendant and cannot modify the order of April 2nd, 1907, in any way whatever.

4. Because by making the order of April 2nd, 1907, it became res adjudicata in this case that the defendant was then in possession of the shippers' statements of claims the subject of this rule and the questions of possession and relevancy are not disputable now on the trial.

5. The Court had no jurisdiction to grant the rule to show cause of May 13, 1908.

6. The granting of the rule to show cause of May 13, 1908, opened the entire controversy which had been closed by the peremptory order of April 2nd, 1907, and deprives the plaintiff of the benefit of the said order of April 2nd, 1907, as guaranteed to the plaintiff by Section 724 of the Revised Statutes of the United States and leaves the plaintiff without the benefit of subpoenas duces tecum to the defendant and its officials which could not be used by the plaintiff simultaneously with its demand that the order of April 2nd, 1907, should be obeyed under the penalty of a default judgment.

7. The effect of the rule to show cause of May 13, 1908, is de novo to inquire into the necessity of producing shippers' statements which the order of April 2nd, 1907, ordered to be produced.

JAMES W. M. NEWLIN,
For Plaintiff Exceptant.

327 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

And now, May 13, 1908, on motion of James W. M. Newlin, for the plaintiff, and on consideration of the petition of the plaintiff this day filed, it is ordered that the defendant produce before the Clerk of this Court within 24 hours the claims transmitted by J. G. Searles, defendant's Coal Freight Agent, to Oscar A. Knipe, the defendant's Auditor of Freight Receipts, in the letters addressed by said Searles to said Knipe, and now the subject of examination for tabulation before the Clerk by the Audit Company of New York, as accountants appointed by the Court under the consent order of May 12th, 1908.

(Endorsed: No. 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Company vs. Pennsylvania Railroad Company. Order on plaintiff's petition filed May 13, 1908.)

(Endorsed: 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Company vs. Pennsylvania Railroad Company. Exceptions to granting of rule to show cause of May 13, 1908. Newlin. Filed May 14, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

328 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Exceptions of Plaintiff to Answer of Defendant to Rule of May 13, 1908, to Show Cause Why the Defendant Should Not Produce Claims of Shippers Transmitted by J. G. Searles, Defendant's Coal Freight Agent, to Oscar A. Knipe, Defendant's Auditor of Freight Receipts, in Sundry Letters Referred by the Court by Consent to the Audit Company of New York to Tabulate.

1. In the petition of the plaintiff on which the rule to produce was granted returnable February 13, 1907, it was alleged inter alia that these shippers' statements of claim were then in the possession of the defendant and the defendant's answer to the said rule did not deny

the possession of the same, and upon said petition and answer the Court on April 2nd, 1907, made an order inter alia directing the production of the said shippers' statements of claim upon the trial of the cause, which was a judicial ascertainment of the fact of possession and relevancy which cannot be denied in the answer of the defendant to the rule of May 13, 1908.

2. The said letters of said Searles showed that when they were written these shippers' statements of claim were in his possession and were by him transmitted to another employé of the defendant, to wit, Oscar A. Knipe, defendant's auditor of freight receipts, and the said answer to the rule of May 13, 1908, is not sufficient
329 to show that the said shippers' statements of claim were not in the possession of the defendant at the time the order of April 2nd, 1907, was made making absolute the rule to produce returnable February 13, 1907.

3. Because it does not appear that the person signing the said answer and the person swearing to the said answer had any personal knowledge of the allegations contained in the said answer.

4. Because the Court has no power at this time to modify the aforesaid order of April 2nd, 1907, on the rule to produce, returnable February 13, 1907.

5. If the Court had such power the answer of the defendant sets no adequate reason for its exercise.

6. Because the statement contained in the fifth paragraph of the answer beginning with the words "subsequently" is shown by the record not to be true.

7. Because the sixth paragraph of the answer beginning with the words "as this respondent," is argumentative and states a contention of law and not fact and is unfounded in law.

8. Because the statement contained in the seventh paragraph of the answer is shown by the record not to be true.

The rule of April 1st, 1908, upon which no order has been made related to statements of claims made by the plaintiff itself to the defendant as the basis of obtaining rebates, and the petition of May 13, 1908, related to the statements of claims made to the Railroad Company as the basis of rebates by other shippers.

JAMES W. M. NEWLIN,
For Plaintiff.

(Endorsed: 69. April Sessions, 1904. C. C. U. S. E. D.
330 Penna. International Coal Mining Company vs. Pennsylvania Railroad Company. Exceptions of plaintiff to answer of defendant to rule of May 13, 1908. Newlin. Filed May 14, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of
Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
VS.
PENNSYLVANIA RAILROAD COMPANY.

Before Holland, J.

Order.

And now, May 15, 1908, the exceptions of the plaintiff to the rule of May 13, 1908, and to the answer of the defendant to the rule to show cause of May 13, 1908, are dismissed without prejudice to the right of the plaintiff on the trial to examine witnesses or offer other evidence against the said answer.

Exceptions allowed to the plaintiff to the making of the above order.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

(Endorsed: No. 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Company vs. Pennsylvania Railroad Company. Order dismissing exceptions of plaintiff to defendant's rule to show cause of May 13, 1908. Filed May 15, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

331 And afterwards, to wit, on the 29th day of April, 1908, a jury being called, come, to wit:

Amandus Sieger,
Henry J. Oswald,
Albert E. Turner,
William H. McClain,
James C. Berger,
George M. Bunting,

Robert M. Griffith,
Harvey G. Hartacher,
Morgan M. Kalbach,
Thompson Richards,
David C. Pritchard,
Rush B. Smith,

who were respectively sworn or affirmed to try the issue joined

And afterwards, to wit, on the 23rd day of May, 1908, the jurors aforesaid upon their oaths and affirmations respectively do say that they find for the plaintiff and assess the damages at Twelve thousand and thirteen and 51-100 dollars.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Be it remembered, That in the said term of April, 1904, came the said plaintiff into the said Court, and impleaded the said defendant in a certain plea of assumpsit, &c., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout 332 pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said Court, held at the County aforesaid, before the Honorable James B. Holland, Judge of the said Court, the twenty-ninth day of April, 1908, the aforesaid issue between the said parties came to be tried by a jury of the said County for that purpose duly impanelled (prout list of jurors), at which day came as well the said plaintiff as the said defendant by their respective attorneys; and the jurors of the jury aforesaid impanelled to try the said issue, being also called, came and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said defendant did except to the rulings of the Court as herein appears.

333 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

April Term, 1905.

No. 25.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Holland, J.

PHILADELPHIA, April 29th, 1908.

The above cases are tried together under an order of the Court.

Present:

J. W. M. Newlin, Esq., for plaintiff;

F. I. Gowen, Esq., E. J. Sellers, Esq., and John Hampton Barnes, Esq., for defendant.

Eighteen jurors having been called, counsel for plaintiff interrogated them severally as to whether or not they were stockholders, bondholders, employes or shippers of the defendant company.

Nos. 4, 7, 8, 9 and 12 replied that they were shippers and were thereupon challenged for cause by plaintiff.

(Challenge overruled. Exception noted for plaintiff.)

334 Nos. 10, 12, 14 and 18 replied that they were stockholders.

(Challenged for cause by plaintiff. Challenge sustained.)

Other jurors having been called in their places, No. 18 stated that he had formerly been an employe of defendant for 26 years, but was not now in that employment.

(Challenged for cause by plaintiff. Challenge overruled. Exception noted for plaintiff.)

The jury having been sworn, the tenth juror stated that his former answer had been misunderstood and that he was a stockholder. He was thereupon excused and another juror called, who stated that he was a shipper.

(Challenged for cause by plaintiff. Challenge overruled. Exception noted for plaintiff.)

Counsel for plaintiff moves to amend the last paragraph of the first count of the plaintiff's statement by striking out the figures "\$37,268.85" and inserting in lieu thereof the figures "\$150,000."

(Amendment allowed. Exception noted for defendant.)

At the request of counsel for plaintiff the following paper is filed and spread upon the record:

335 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY.

vs.

PENNSYLVANIA RAILROAD COMPANY.

Before Holland, J.

And now, April 22nd, 1908, comes the plaintiff by James W. M. Newlin, its attorney, and moves the Court to grant a rule on the defendant to show cause why the plaintiff should not have leave to amend the last paragraph of the first count of plaintiff's statement by striking out the figures "\$37,268.85" and inserting in lieu thereof the figures "\$150,000."

JAMES W. M. NEWLIN,

For Plaintiff.

Rule to show cause granted returnable April 24th, 1908, at 10 a. m.

By the Court.

HENRY B. ROBB, *Clerk.*

Mr. NEWLIN: Plaintiff calls, under Revised Statute 724, under the order of April 2nd, 1907, on the rule returnable February 13th, which reads thus:

"And now, April 2nd, 1907, on motion of James W. M. Newlin for plaintiff, and the answer filed by the defendant to the rule returnable February 13th, 1907, on the defendant to show cause why it should not produce upon the trial the documentary evidence set forth in the affidavit of J. Chester Wilson, secretary of the 336 plaintiff, upon which the rule to show cause was granted, having been determined by the Court to be insufficient, it is ordered that the defendant shall produce the said documentary evidence at the trial of the cause, and the rule to show cause is made absolute."

The plaintiff under this order now calls for the production of the documentary evidence set forth in the affidavit of J. Chester Wilson above referred to, in paragraphs one and two, down to and including subdivision A and the first paragraph of sub-division B, which reads as follows:

"STATE OF PENNSYLVANIA,
City and County of Phila., ss:

1. J. Chester Wilson, being duly sworn according to law, deposes and says that he is the secretary of the plaintiff, The International Coal Mining Company, and that the Pennsylvania Railroad Company, the defendant in the above cause, has in its possession, power and custody and control, certain statements, claims, receipts, checks, drafts, vouchers, books and other writings, which contain evidence pertinent to the issue in the above cause, and which it is necessary to have produced on the trial of the cause, and which also it is necessary to have inspected in advance of the trial if this can lawfully be done under the provisions of Section 724 of the Revised Statutes of the United States.

2. This documentary evidence shows that the plaintiff, the International Coal Mining Company, was discriminated against by the defendant, the Pennsylvania Railroad Company, for the benefit of the favored shippers named in the plaintiff's statement, for the benefit of other shippers in the circumstances set forth in the plaintiff's statement, by the following methods:

A. By the payment of rebates during the continuance of the published rates then in existence.

337 B. Where in particular years, to wit, 1900 and 1901, in which the published rates were increased respectively 45 and 55 cents per ton, certain favored shippers were allowed a rebate at least equalling the increase, upon the ground that they were under contracts to deliver coal, which contracts call for the delivery at periods after the increase in the freight rate, which contracts are overlapping contracts. The plaintiff was forbidden to make such contracts, and during the same period of time and in the same circumstances the favored shippers, notably the Berwind-White Coal Mining Company and the Morrisdale Coal Company, and others, were allowed to make such contracts, and did pay the higher rate of the new published tariffs, but were repaid the increase and more than the increase by the defendant, the Pennsylvania Railroad Company."

In addition to this call, read out of the affidavit for the rule and which refers to the plaintiff's statement, the attention of the Court is called to these portions of the plaintiff's statement verbatim.

Plaintiff's statement p. 16, states:

"Plaintiff says that the defendant did then and there and during all the time aforesaid unduly, unreasonably and unlawfully discriminate against the plaintiff in the transportation of said coal in this, that the defendant, to the great injury and damage of the plaintiff, did charge demand, collect and receive from or for the plaintiff for the transportation of said coal, a sum in excess of that charged and collected by the defendant from others, from the same place to the same place, upon like conditions, under similar circumstances and during the same period of time, which is forbidden by the Interstate Commerce Acts," and further, "The excess of freight which was paid by or for the plaintiff and collected by the defendant, on said shipments of plaintiff's coal by undue, unreasonable and lawful discrimination as aforesaid, over and
338 above the sum charged and collected by the defendant from others for like services from the same places to the same places, upon like conditions, under similar circumstances and during the same period of time, amounted to the sum of fifteen cents per ton on 161,753 tons, making \$24,262.95, and amounted to the sum of 45 cents per ton on 128,902 tons, equal to \$13,005.90, the two sums making in all \$37,268.85. The plaintiff further says that the variation in the discrimination between 15 cents per ton and 45 cents per ton consisted in this, that on all shipments made up to April 1st, 1899, the discrimination was 15 cents per ton, and that after that date it was 45 cents per ton."

I ask for the production of all the documentary evidence that is covered by that statement.

(Counsel for defendant in reply produce a number of books and papers.)

Mr. NEWLIN: I ask now for the production of all the matters that I have referred to in the extracts from the petition as read, which relate to the Berwind-White Coal Mining Company.

The COURT: Call having been made for the books and papers and statements set forth in the petition, and counsel for defendant producing in court a great number of papers in which it is stated to the Court that the entire information desired, as set forth in the petition of plaintiff for the books and papers, is contained, the Court rules that the production is sufficient, and the plaintiff will have the privilege of examining the papers to ascertain what information *he* may desire for the purpose of the trial of this case.

Mr. NEWLIN: I now make a call for the separate production of the papers relating to the allowance to the Berwind-White Coal Mining Company.

The COURT: The defendants have said that they have produced all books and papers you have asked for connected with
339 your suit, that they are all mingled together, there are a great number of them, it is a long system of bookkeeping, and that there

they are. I hold that that is a sufficient production until you have examined them and seen whether they are there or not.

Mr. NEWLIN: What order will you make about our examination of these books and papers?

The COURT: The documents will be put in the possession of the Clerk of the Circuit Court, and we will adjourn until an examination has been made. We will adjourn until Monday week.

Mr. NEWLIN: The hearing is adjourned until Monday week at ten o'clock. Meanwhile all these papers are to be put in the custody of the Clerk and are subject to examination by the plaintiff?

The COURT: Yes.

Trial continued until May 11th, 1908, at 10 a. m.

PHILADELPHIA, *May 11th*, 1908—10 a. m.

At the request of counsel for plaintiff the names of witnesses were called and the following failed to answer: John P. Green, John B. Thayer, W. J. Foux, Frederick McOwen, Andrew Taggart, Boyd Lee Spahr, Ellis Ames Ballard, G. R. Rodgers, Frank H. Wigton, A. M. Baker and Samuel Meredith.

Counsel for plaintiff states that Mr. John B. Thayer was at the Bryn Mawr Hospital, where his wife had undergone a serious operation, which prevented his attendance today.

Mr. NEWLIN: I will have leave later on, if necessary, to
340 apply formally for attachments for the witnesses who have not attended.

The COURT: Yes.

Mr. NEWLIN: On page 7 of the stenographer's notes is a ruling made by your Honor, that the production in bulk of all this testimony was a sufficient production under the rule. I ask for an exception to that ruling now, as if it had been made on April 29th.

(Exception noted for plaintiff.)

Mr. NEWLIN: The attention of the Court is called to a package marked "F", and alongside of that "A 333,645" and marked by the clerk with the name of the case and "this bundle was not produced in court, but was left in the clerk's office on the afternoon of April 29th, 1908. Henry B. Robb, Clerk." As to that I desire to know whether the defendant desires this package to be considered as a part of the answer to the rule to produce.

Mr. GOWEN: Those are part of the papers and books called for.

Mr. NEWLIN: You want it considered part of your answer to the call?

Mr. GOWEN: Yes.

Mr. NEWLIN: I proceed with the calls to produce. Plaintiff further, under the order of April 2d, 1907, making absolute the rule returnable February 13th, 1907, to produce, etc., now calls for the production of the documentary evidence set forth in the affidavit of J. Chester Wilson, paragraphs one and two inclusive, including subdivision A. (Mr. Newlin here read from the affidavit of Mr. Wilson down to and including paragraph two, sub-division B). I now ask for a reply to that call.

Mr. GOWEN: Defendant's counsel replies that the evidence
341 already produced and inspected by plaintiff's counsel, discloses all payments made on account of the overlapping contracts.

Mr. NEWLIN: This is excluding overlapping contracts.

Mr. GOWEN: All payments made, either in adjustment of rates or on account of overlapping contracts.

Mr. NEWLIN: I except to the return or statement by counsel as to these papers being in answer to the call made, and I call attention to the fact that in the call it expressly excludes the overlapping contracts, which were the subject of another and future call, and I except to the production for that reason, because it is not what I have just read, but the reverse. It purports to be in a reply to the demand for the overlapping contract matters, which are excluded in this present branch of the call. I also desire to except to the production in bulk without any tabulation or scheduling of documentary evidence, which the other day necessitated the delay for examination, which may continue from time to time as the same exigency arises. I ask therefore for the Court to determine that the answer to the call is insufficient.

The COURT: The objection to the return is overruled, and it is regarded as sufficient.

(Exception noted for plaintiff.)

Mr. NEWLIN: I now make a further call, as follows:

Plaintiff further, under the order of April 2nd, 1907, making absolute the rule returnable February 13th, 1907, to produce, etc., now calls for the production of documentary evidence set forth in the affidavit of J. Chester Wilson, paragraphs one and two, including sub-division A and sub-division C, which latter sub-division

342 C reads thus: (Mr. Newlin here read subdivision C of the affidavit of J. Chester Wilson.) I now ask for a return to that call.

Mr. GOWEN: In answer to that call defendant produces the original of the lease of the Harsimus Pier to the Berwind-White Coal Mining Company, and also a supplementary agreement relating to the lease of the same, which was prepared but not executed, but which he understands has been acted under by the parties.

Mr. NEWLIN: Can this be marked as an answer to the third call, being the call I have just made of May 11th, 1908, concerning the Harsimus Pier?

The COURT: It is there. As soon as you are in shape to use it it will be marked.

Mr. NEWLIN: Now I make another call. Plaintiff further, under the order of April 2nd, 1907, making absolute the rule returnable February 13th, 1907, to produce, now calls for the production of documentary evidence set forth in the affidavit of J. Chester Wilson, in paragraphs one and two, including sub-division A which reads thus: (Mr. Newlin here read sub-division A of the affidavit of J. Chester Wilson.) Also paragraphs three and four of the said affidavit of J. Chester Wilson, which reads as follows: (Mr. Newlin here read paragraphs three and four of the affidavit of J. Chester Wilson).

Mr. GOWEN: Defendant's counsel answers that the documents already produced are similar in character to those which were produced in the trial in the Court of Common Pleas No. 2. They show all the transactions during the periods covered by the pending action in relation to payments on account of the adjustment of rates or rebates, or any other concessions made. The defendant was not
343 able to produce in Court of Common Pleas No. 2, nor is it now able to produce, the checks themselves.

(Mr. Newlin objects to the last statement.)

Mr. GOWEN: I supposed what he wanted produced was papers of the exact character that were produced in the Common Pleas Court No. 2, and that he so stated in his petition. I say that the papers which have been produced are press copies of statements upon which adjustments of rates were made. They are press copies of a memorandum attached showing the amount for which a check was to be sent to the shipper. We are unable to produce those checks, as we were unable to produce those checks in Common Pleas No. 2, but I am perfectly willing to stipulate that checks were sent to the shippers for the amounts shown in that memorandum.

Mr. NEWLIN: We have called for the papers themselves, that is to say, the original letters and the claims presented by the shippers.

The COURT: I have not anything before me. They say they produce them and you say they did not. I say their answer is sufficient.

(Exception noted for plaintiff.)

Mr. NEWLIN: There was a rule granted on April 1st, 1908, to show cause why certain documentary evidence should not be produced in this cause on the trial. There was an answer to that rule filed, and there was no action by the Court, no order made by the Court specifically, what should be produced, or making the rule absolute, or anything of the kind. I will ask to take that up now and dispose of it.

The COURT: The petition is refused until you get in shape to show that you want to use them.

(Exception noted for plaintiff.)

344 Mr. NEWLIN: I will ask your Honor to make the present order without prejudice to my right later on to recur to the subject of this rule of April 1st, 1907.

The COURT: Yes.

Mr. NEWLIN: I propose to ask for returns to rules to produce in case No. 25. These were all in case No. 69.

The COURT: Are they the same papers?

Mr. NEWLIN: No; there are some differences in these rules to produce.

The COURT: Have you produced all the documents called for in No. 25?

Mr. GOWEN: We are in this position in No. 25. A large number of the papers, in fact a very large portion of the papers which we are asked to produce in that case, were those which were produced and submitted to the Interstate Commerce Commission in connection with the investigation conducted by it in the summer of 1906. When

I found your Honor wanted to try this case at the same time as No. 69, not having previously anticipated the case would be reached at this session, I started to get together those papers, and I found then that a large part of them, in fact all that we had submitted to the Interstate Commerce Commission, were still in the possession of the Commission, not having been returned to us. I at once got into communication with the secretary of the Interstate Commerce — with this result. He says he has a room full of papers, that they are original files of the Commission which the Commission is not willing should go out of their possession, that he does not want to send everything he has, but that if the Court will indicate what papers are to
 345 produced he will send a custodian. He will get at them as soon as he can and send them here in the possession of some custodian. This morning a young man turned up at my office from the Commission to find out, and to go back this afternoon with any direction the Court might have to give him as to the production of those papers. Because of that situation, I should think it was desirable to pursue this course in No. 25. No. 25 is the case which is brought under the Anti-Trust or Sherman Act. Under your Honor's ruling in the American Union Company's case there is no cause of action stated in that case. In the American Union case you did not dismiss the action because you considered that the statement could be sustained under the Interstate Commerce Act. Of course, that condition is not presented here, because we have an action already pending under the Interstate Commerce Act, which is the one we are trying, and I suggest therefore that with a view to saving the time and trouble of everybody, at the proper stage objection be made to the introduction of any evidence in No. 25.

The COURT: Does the claim in No. 69 cover the same transactions as the claim in 25? Is it your understanding that they cover the same transaction?

Mr. GOWEN: Precisely the same shipments.

The COURT: One is under the Interstate Commerce Act and the other is under the Anti-Trust Act, for triple damages. That is your understanding?

Mr. GOWEN: Yes, sir; that is my understanding. There is no doubt about that. It would be idle to go ahead and waste time and bring all those records up from Washington, (we have some in our possession here) only to have your Honor instruct the jury at last
 345 that there was no cause of action under the Sherman Act or Anti-Trust Act, and consequently, a verdict must be rendered for defendant. Of course, No. 69 is a different case.

Mr. NEWLIN: There are several propositions here, and I will take them up seriatim. The first one is that, a rule having been granted to show cause why certain papers should not be produced, and the answer having been put in which did not deny possession of the papers, and did not make any of the statements that are simply made by counsel, and we know nothing about whether the statements are correct or not—instead of putting that in the answer to the rule, in which event, if there had been a denial of possession of the papers, we could have taken depositions against the answer—

The COURT: There will be trouble about that. If No. 25 goes on and you get to a position in the case where you are entitled to a paper and they have it, there will be no trouble about that. They said they were not compelled under the law to produce, and it has been ruled that they were. They do not deny possession, but they now make a statement giving it as their excuse for not producing up to this time. If it should turn out in the trial of this case that they must produce, we will see that you get the papers that are called for, which are in their possession.

Mr. NEWLIN: Do I understand your Honor to rule that where a petition distinctly alleges that certain papers are in possession of the defendant, and a rule to show cause is granted, and possession is not denied in the answer, and therefore it is an admitted thing that they have the papers, because they do not deny it, that they can now at bar come in with what is a supplemental answer, and say, without any opportunity on behalf of the plaintiff to examine into the truth of their statement, that they have not got the papers that they were charged with having a long while ago and which they did not deny the possession of?

The COURT: No. I do not rule that they are entitled to do that. They have told the Court why those papers are not here. They are in the hands of the Interstate Commerce Commission, and they will be produced if it should be held by the Court that it is necessary to produce them in the trial of this case. That is, they will produce whatever is relevant to the trial of No. 25, provided under the ruling of this Court that case is to be tried. They have a perfect right to raise that. That is what I want to hear you on.

Mr. NEWLIN: As I understand it now, where the answer filed before the rule is made absolute, did not deny possession of the paper, that paper must be produced, providing it is relevant to something before the Court in the trial of the cause?

The COURT: If they have it, yes. We will find that out when we come to it. I want to hear you on the next point.

Mr. NEWLIN: I except to your Honor's ruling.

(Exception noted for plaintiff.)

The COURT: I want to hear you as to whether that cause is to be tried or not. I did not know that that was the condition of that record in that particular cause.

Mr. NEWLIN: I do not admit it is. The order now is that you refuse to compel the production of what is called for.

The COURT: Yes, for the present.

Mr. NEWLIN: Will your Honor add "without prejudice"?

The COURT: Yes, you can bring it up at any time.

348 Mr. NEWLIN: Your Honor will observe there is no demurrer in this case. I went to trial on plea of Not Guilty. There has been no attempt to raise the question whether it is the same as the American Union or not.

The COURT: Is the amount claimed for the return as rebates on the same shipments for which you claim damages in No. 69?

Mr. NEWLIN: It is a totally different thing in this respect. In 69 there is a suit for single damages for the return of the over pay-

ments with interest on certain shipments that are specified in the Schedule A. In this one under the Anti-Trust Act, the damages claimed are for the destruction of the business of the company, not for the rebates on these particular shipments. The two cases run together in this respect, that we claim that the business was broken up by the granting of the very rebates as to which we are suing to get back our money in the suit under the Interstate Commerce Act, but in that Act we cannot recover for damages consisting of destroying our business, breaking it up by making it impossible to conduct the business at a profit. I considered that could only be done under the Anti-Trust Act, and therefore this other suit was brought under the Anti-Trust Act for the reason that it could not be included in No. 69 under the Interstate Commerce Act. The only way the shipments entered into No. 25 is that we claim it was because of discrimination shown in those shipments that our business was broken up and the profit of that business was destroyed. Instead of conducting the business at a profit, we were conducting it at a loss, and had to give it up altogether.

THE COURT: In your claim of damages under the Interstate Commerce Act, do you not claim all damages resulting from discrimination?

349 **MR. NEWLIN:** We claim as damages a lump claim for damages, which is fully up to and may possibly be more than the actual money back with interest. I cannot tell, because that depends upon certain things, whether they constitute discrimination, whether we could under that claim what is in this separate suit, simply the destruction of the business, the future business and the current running business. That is an open question. It may be that it could be recovered under No. 69.

THE COURT: Under what law can you claim that, if you cannot claim it under the Commerce Act in the United States Court?

MR. NEWLIN: I claim it under the Anti-Trust Act. In the case of the American Union Coal Company you have determined that suit will not lie under the Anti-Trust Act for an injury arising in this way, and that action, however, was sustained because the plaintiff's statement was so worded that it was a perfectly good plaintiff's statement under the Interstate Commerce Act, so that in overruling a demurrer to the plaintiff's statement it was overruled with a qualification stating the law to be, as your Honor conceived it to be, and suggesting a motion to amend the plaintiff's statement so as to strike out the reference to the Sherman Act and let it stand as a declaration under the Interstate Commerce Act, and that is the condition of it now. That is the case that was down on the list but could not be reached. Whether the American Union case and this one are identical is a question for argument, but at all events we have the very extraordinary position here that as to case No. 25 I myself suggested to the Court before the jury was sworn, that that case be not tried at present. The Court ordered it to be tried with this one. There is no

350 demurrer. A demurrer in No. 25, if it is not too late for a demurrer, would raise the question whether anything could be done in No. 25 in the condition in which it is, but there is

not only no demurrer, and the decision in the American Union case was months ago, and there has been ample opportunity, and we are here with a record which admits this is a good cause of action, because there is no demurrer, and there is a plea of the general issue, to wit, Not Guilty. In those circumstances I submit that the case ought to go on, in view of the order of Court that it should go on after this condition of affairs was brought to your Honor's attention before this jury was sworn. I do not know what sort of a record it would make to review any order that your Honor might make in No. 25 now that the matter has gone to the condition it is in, without taking up the whole record in No. 69. For instance, suppose your Honor were now to rule that no right of action exists under the plaintiff's statement in No. 25. How can I review that by itself when it is made part of this record?

The COURT: I will put you in shape so you can review it. When you go to offer evidence on it, then I will dispose of that.

Mr. NEWLIN: When we reach the point where evidence is offered, then for the reason given it might be ruled against. Your Honor might very readily do that thing now, by ruling that under the petition.

The COURT: We will leave it go for the present.

Mr. NEWLIN: Now I will make this call under No. 25.

The plaintiff in the International Coal Mining Company vs The Pennsylvania Railroad Company, to April Session, 1905, No. 25, under the order of October 28th, 1907, which reads as follows: "And now, October 28th, 1907, on motion of James

351 W. M. Newlin, for the plaintiff, the rule for the production of documentary evidence granted May 10th, 1907, returnable May 15th, 1907, and the further rule to produce documentary evidence granted June 19th, 1907, returnable September 4th, 1907, are both made absolute," calls upon the defendant to produce the documentary evidence concerning the plaintiff's shipments and the rebates paid to the plaintiff thereon as specified in the plaintiff's petitions of May 10th, 1907, and June 19th, 1907, which read respectively as follows:

(Extracts from Petition of May 10th, 1907.)

Page 1, paragraph 1:

"Your petitioner avers that the Pennsylvania Railroad Company, the defendant in the above cause, has in its possession, power, custody and control certain statements, claims, receipts, checks, drafts, vouchers, books and other writings hereinafter more particularly described which contain evidence pertinent to the issue in the above cause and which it is necessary to have produced on the trial of the cause, and your petitioner prays that a rule to show cause may be granted to this effect under the provisions of Section Seven Hundred and Twenty-four (724) of the Revised Statutes of the United States.

Same page, paragraph 2:

Nature of the Action.

From April 1st, 1894, to April 1st, 1901, the plaintiff was engaged in shipping bituminous coal by way of the Pennsylvania Railroad Company from the Clearfield Region in Pennsylvania to the points of delivery beyond the State of Pennsylvania set forth in detail in schedule "A" attached to this petition and which schedule your petitioner prays may be taken as a part of this petition.

352 Page 3:

Documentary Evidence in the Defendant's Possession and Pertinent to the Issue Showing the Plaintiff's Shipments During the Years Ending April 1st 1895, to April 1st, 1901, Both Inclusive, and Showing the Payments of Rebates During a Portion of this Time to the Plaintiff and the Refusal of Payment During the Remaining Time.

Page 3 continued, Paragraph 3:

Your petitioner avers concerning its own shipments set forth in schedule "A" hereto attached that as these shipments were made your petitioners (following a custom which existed between your petitioner and the defendant and also between all other shippers and the defendant) from time to time generally monthly, presented a statement to the Railroad Company setting forth its shipments in detail giving car numbers, numbers of tons carried, and shipping points and destination, and sometimes claiming a fixed rebate and at other times leaving that to be settled by a bargain made from time to time with J. G. Searles, Coal Freight Agent of the Pennsylvania Railroad Company, and Oscar Knipe, Auditor of Freight Receipts. At the time these statements of the petitioner were handed in, the Railroad Company had already in its own possession the same information, and clerks of the Railroad Company compared the petitioner's statement with the Railroad Company's own accounts and if they agreed or were made to agree by mutual adjustment the Auditor of Coal Freight Receipts fixed the amount of the rebate and the same was paid by check to J. G. Searles, Coal Freight Agent. A part of the documentary evidence consisted of letters from the coal freight agents' department to the department of the auditor of coal freight receipts, of which press copies were kept which accompanied the statements of the accounting department, and the coal freight agent's department also kept a press copy of a memorandum of a slip that accompanied a check for the rebate when it was sent to the petitioner, and the entire transaction was evidenced by book or books and the other writings and the check was drawn for the amount appearing on these books and writings and was signed by either the Auditor of coal freight receipts, or by some other person for the Railroad Company, and then was countersigned by J. G. Searles, Coal Freight

Agent, and was then given to the petitioner. In this matter in addition to the statements of shipments made by the petitioner to the Railroad Company, and the statements in the hands of the Railroad Company, the rebates paid were evidenced by other documentary proof.

a. The written communications between the coal freight agent and the Auditor of Coal Freight Receipts, copies of which are kept in letter books.

b. The checks for the rebates paid to petitioner. These were countersigned by the controller, the auditor of coal freight receipts and the coal freight agent, and each of these departments kept a permanent record of these checks, which came back to the Railroad Company, and the stubs of the check book furnished further information in regard thereto, so that the transactions can all be traced through documentary evidence in the hands of the defendant, the Pennsylvania Railroad Company.

Page 5:

Your petitioner further avers that all the papers called for in this part of its petition concerning your petitioner's shipments and the rebates allowed thereon and the claims for rebates refused thereon since the 1st of April, 1899, are in the possession of the Railroad Company, and are pertinent to the issue between your petitioner and the Pennsylvania Railroad Company in this cause.

* * * * *

354 Page 6:

Your petitioner further shows that there is a further important reason why the defendant should be compelled to produce the papers herein referred to at the trial, viz., that their production will obviate the necessity for the petitioner as plaintiff, proving from its books day by day every shipment made during the period mentioned herein, which proof by the plaintiff from its own books would probably take more than a day's time on the trial which can be saved."

(Extracts from Petition of June 19, 1907.)

Page 2, paragraph 1:

"Your petitioner avers that the Pennsylvania Railroad Company, the defendant in the above cause, has in its possession, power, custody and control certain statements, claims, receipts, checks, drafts, vouchers, books and other writings hereinafter more particularly described, which contain evidence pertinent to the issue in the above cause, and which it is necessary to have produced in the trial of the cause, and your petitioner prays that a further rule to show cause may be granted to this effect under the provisions of Section Seven Hundred and Twenty-four (724) of the Revised Statutes of the United States.

* * * * *

Pages 4-5:

Your petitioner is further advised by counsel that it has been claimed by counsel for the defendant that certain documentary evidence called for in the rule to produce granted May 10, 1907, was not called for but simply mentioned in the petition upon which said rule was granted.

Your petitioner denies that the fact is as above claimed by the Railroad Company, defendant, and in order to avoid repetition of such claim your petitioner now avers that all the documentary evidence hereinafter mentioned in this further petition is in the defendant's possession and is pertinent to the issue and is hereby
355 called for, and its production is demanded upon the trial.

(Plaintiff's Shipments and Rebates.)

Page 5, continued:

This general averment is now made herein for the purpose of avoiding its constant repetition in this further petition naming any of the documentary evidence hereinafter specified.

Your petitioner further shows that this further petition is not a waiver or a substitution for the petition for a rule to produce upon which a rule was granted May 10, 1907, and for convenience of reference this further petition is paragraphed consecutively from the former petition and begins now herein with paragraph six.

(Plaintiff's Shipments Specified in Schedule "A.")

Paragraph 6:

The plaintiff avers that the defendant has in its possession documentary evidence showing the plaintiff's shipments specified in Schedule "A" attached to the plaintiff's original statement and further set forth in Schedule "A" attached to plaintiff's proposed amendments to its original statement on which a rule to amend was granted June 10, 1907, and the same schedule "A" is attached to the petition for rule to produce books and papers granted May 10, 1907.

The plaintiff avers that this documentary evidence is pertinent to the issue and the plaintiff calls for its production on the trial. The plaintiff further avers that whilst the plaintiff has this same information in its own books it will save time on the trial of the cause to produce the like information out of the possession of the defendant, because the defendant cannot object to its own records of the plaintiff's shipments and the plaintiff is therefore entitled to have the benefit of the admission that will accompany the production by the defendant out of its own possession of this evidence of the plaintiff's shipments."

356 That is the whole of that one call. That is all under 25.
I have four calls under 25 yet to come.

The COURT: The answer the defendant made to the first call in No. 25 is that the papers will be produced if relevant, at the time their relevancy is shown. For the present the production is not required.

(Exception noted for plaintiff.)

Counsel for plaintiff now makes, under case No. 25, the sixth call for May 11th, 1908, which reads as follows:

6th Call for May 11th, 1908.

The plaintiff, under the Order of October 28th, 1907, which reads as follows:

"And now, October 28, 1907, on motion of James W. M. Newlin, for the plaintiff, the rule for the production of documentary evidence granted May 10th, 1907, returnable May 15th, 1907, and the further rule to produce documentary evidence granted June 19, 1907, returnable September 4th, 1907, are both made absolute."

Calls upon the Defendant to Produce.

Documentary evidence in the defendant's possession and pertinent to the issue showing shipments by other shippers during the years ending April 1st, 1895, to April 1st, 1901, both inclusive, and showing payments to said shippers by the defendant of rebates during this time, greater in amount than the rebates paid during the same time to your petitioner as plaintiff.

4th, Concerning the B. W. C. M. Co.

(Here read from the petition of May 10, 1907, the balance of page 7 and all of pages 8, 9, 10, 11, 12, 12½ and 13 as blue penciled in copy of petition for the rule herewith.)

NOTE.—Page 13 is the formal call for the documentary
357 evidence giving the detailed evidence of the transactions covered by the sub-clauses 1 to 12, both inclusive (omit 13) continue to read 14, to 16, both inclusive (omit 17) and 18th subdivision paragraph 4 of the petition of May 10th, 1907.

(Same ruling. Exception noted for plaintiff.)

Counsel for plaintiff now makes the 7th call under case No. 25 for May 11th, 1908, which reads as follows:

(Shipments and Rebates of Other Shippers.)

The plaintiff, under the Order of October 28th, 1907, which reads as follows:

(Here cite order from page 2.)

Calls upon the defendant to produce the documentary evidence in the defendant's possession and pertinent to the issue showing shipments by other shippers during the years ending April 1st, 1895,

to April 1st, 1901, both inclusive, and showing the payment to said shippers by the defendant of rebates during this time greater in amount than the rebates paid during the same time to your petitioner as plaintiff, and which payments were made to —.

Pages 14-15:

Morrisdale Coal Company, Columbia Coal Company, Alexandria Coal Company, Sterling Coal Company, Loyal Hanna Coal and Coke Company, Cresson & Clearfield Coal & Coke Company, Commercial Coal Mining Company, South Fork Coal Mining Company, Glenwood Coal Company, Cambria Coal Company, David E. Williams & Company, W. H. Piper & Company.

Same page, paragraph 5.

Your petitioner avers that during the whole period of time covering your petitioner's shipments as plaintiff, viz., during the years ending April 1st, 1895, to April 1st, 1901, both inclusive, all 358 of the above named corporations and firms and others made shipments of bituminous coal by the Pennsylvania Railroad Company between the same initial and delivery points and at the same time and in similar circumstances as the shipments made by your petitioner, the plaintiff, and your petitioner further avers that during the whole of the said period of time the defendant paid rebates on said shipment to the above mentioned corporation and firms which exceeded in amount per ton the rebates paid by the defendant to your petitioner and your petitioner further avers that these rebates to the above mentioned corporations and firms were claimed by the said corporations and firms in exactly the same way as hereinbefore detailed as to your petitioner's shipments and the payment of rebates to the said corporations and firms gave rise to the same documentary evidence which is in the possession of the defendant, the Pennsylvania Railroad Company, and is pertinent to the issue in this cause.

And your petitioner prays that the defendant may be compelled to produce the same upon the trial of the cause.

And your petitioner will ever pray.

(Same ruling. Exception noted for plaintiff.)

Counsel for plaintiff now makes under case No. 25, the 8th call for May 11th, 1908, which reads as follows:

(Overlapping Contracts.)

The plaintiff under the Order of October 28th, 1907, which reads as follows:

(Here cite order from page 2.)

Call upon the defendant to produce the overlapping contracts specified in paragraph 7 of the plaintiff's petition of June 19, 1907, which reads as follows:

359 Paragraph 7, page 6. Overlapping contracts. "The plaintiff avers that it was forbidden by the defendant to make contracts for the delivery of coal which would continue longer

than until the succeeding 31st day of March in the then current year and that the defendant throughout the whole of the time covered by the plaintiff's shipments and specified in Schedule "A" above mentioned, was in the habit of permitting the Berwind-White Coal Mining Company and the Morrisdale Coal Company and other companies to make such overlapping contracts for the delivery of coal, and as a part of its custom in this regard these favored companies reported their overlapping contracts to the defendant and the defendant kept a record thereof, and during the continuance of such overlapping contracts whether in writing or by recognized course of business, the defendant allowed a rebate to the Berwind-White Coal Mining Company and the Morrisdale Coal Company and others so situated, which rebate was for the difference between the previous freight rate and the increased rate, and upon this ground the defendant allowed to the said favored companies a rebate of not less than forty-five cents a ton for the period from April 1st, 1899, to April 1st, 1900, and allowed a like rebate of not less than fifty-five cents a ton for the period from April 1st, 1900, to a period not later than April 1st, 1901, during the year 1901. Your petitioner avers that the defendant has in its possession documentary evidence showing the granting of these rebates and that this evidence is pertinent to the issue petitioner avers, and this petitioner calls for the production thereof at the trial under this rule.

(Same ruling. Exception noted for plaintiff.)

Counsel for plaintiff now makes under case 25 the 9th call for May 11th, 1908, which reads as follows:

(Petition of June 19, 1907, page 7-8.)

The plaintiff under the Order of October 28th, 1907, which reads as follows:

360 (Here cite from page 2 and also from generals.)

"Calls" upon the defendant to produce the documentary evidence concerning pro rating by defendant with the Altoona Coal and Coke Company and the Latrobe Coal Company set forth in the plaintiff's petition of June 19, 1907, which reads as follows:

Paragraph 8. Alleged Pro-Rating with Altoona Coal and Coke Company and the Latrobe Coal Company. Your petitioner avers that for the purpose of fraudulently concealing a rebate on their coal shipments, the defendant allowed to the Altoona Coal & Coke Company from thirteen to eighteen cents per ton on all of its own coal moved from its mines to the main line of the defendant a distance not exceeding eight miles, and that nothing was furnished by the said Altoona Coal & Coke Company except the trackage, the cars being furnished by the Pennsylvania Railroad Company and the Altoona Coal & Coke Company claiming to have furnished an engine for hauling, which claim the petitioner does not admit. In the case of the Latrobe Coal Company it was in like manner allowed ten cents per ton for carrying its own coal on a siding one and three-quarters miles to the defendant's main track.

All these discriminations were practiced against the plaintiff and

in competition with the plaintiff in making its shipments specified in aforesaid schedule "A."

The petitioner avers that the defendant has documentary evidence showing these discriminations and that the same is pertinent to the issue, and petitioner calls for the production of the same on the trial of this cause in answer to the rule asked herein.

(Same ruling. Exception noted for plaintiff.)

J. CHESTER WILSON, sworn.

By Mr. NEWLIN:

Q. You are secretary of this plaintiff company?

361 A. Yes, sir.

Q. Have you examined the documentary evidence that was produced in court on the 29th of April and afterward sent over to the Clerk's office?

A. Yes, sir.

Q. I will now call your attention to package marked "A." Read the designation of the paper as contained on the cover of the package.

A. "From April 2nd, 1900, to September 4th, 1902. A-58 to A-69."

Q. What else is on the outside of the paper?

A. Marked by the Clerk "Case 69, order of April 2nd, 1907. Bundle produced in Court April 29th, 1908. A. Henry B. Robb, Clerk."

Q. Open that on the tables. Does this package contain all the books mentioned on the cover?

A. Package A contains five volumes.

Q. What are the numbers?

A. 58.

The COURT: What is the object of this proof?

Mr. NEWLIN: I want to show a package is brought in which is endorsed by the Railroad Company itself, containing books with certain numbers, and that when we open that package it does not contain the books that are so designated, that certain books are missing.

The COURT: This offer of evidence is overruled for the present until you get somewhere. You have not proven you have a case, that you have shipped any coal, that you are a corporation. Start with your case. The books will come next.

Mr. NEWLIN: We are now engaged under the rule of produce.

The COURT: We will stop our engagement under the rule to produce. It is overruled.

(Exception noted for plaintiff.)

Mr. NEWLIN: What is overruled?

362 The COURT: Your offer of this evidence.

Mr. NEWLIN: I am not offering any evidence. I offer to show by the examination made by this witness of the documentary evidence that he is now speaking of, and the rest of the documentary evidence that was produced on April 29th, 1908, that none of it is a

compliance with the order to produce, that each book containing anything in any way relating to the subject matter, that every entry therein on its face shows that that particular thing is only a part of the transaction, and the part produced does not show the transaction, but that it is contained in a paper referred to but not produced. When we show that, then I will ask your Honor to rule that a certain paper produced is not a compliance for the reason given.

The COURT: When the time comes I will do that. For the present the offer is overruled and an exception noted for plaintiff. As soon as you get to a point where this evidence is necessary, then if you show that it is not what is called for, I will rule on it. Your offer of this evidence is overruled.

Mr. NEWLIN: Your Honor rules now we must go on first and prove our shipments?

The COURT: Go on with your case until you come to a point where your documentary evidence is relevant. Then I will rule as to what is produced, whether it is in compliance with your call.

(Exception noted for plaintiff.)

Q. You have said you are secretary of this company?

A. Yes, sir.

(Witness' attention is called to plaintiff's statement filed in this case, as printed in the printed record that went to the Court of Appeals, page 14 to page 32, and witness' attention is particularly called to what is called schedule A, the statement of shipments of bituminous coal for account of the International Coal Mining Company.)

Q. State whether you prepared that schedule A?

A. Yes, sir.

Q. That is the schedule, is it not, appended to plaintiff's statement in this case No. 69?

A. Yes, sir.

Q. You prepared that yourself?

A. Yes, sir.

Q. You are secretary and were secretary during the time of these shipments?

A. I was.

Q. Were you familiar with the shipments as they were made from time to time?

A. Yes, sir.

Q. From what source did you get the information that is in this schedule A as to the plaintiff's shipments?

A. From our books of original entry.

Mr. NEWLIN: I now offer the books of original entry of the plaintiff, showing the shipments made as set forth in schedule A, attached to the plaintiff's statement, and which I produce in a bundle, just as the defendant produced these other matters.

Q. Are you familiar with the contents of this bundle?

A. Yes, sir.

Q. Does it contain the information from the original books upon which you made up this schedule A?

A. It does.

Q. Is it true that all these shipments were made by the plaintiff between the shipping points given and at the dates given in schedule A, and is all of that information contained in these original books now produced and offered in evidence?

A. Yes, sir.

364 (Counsel for defendant objects to the admission of the books.)

Mr. GOWEN: We object to all the entries which go back beyond the period of six years prior to the institution of the action. This action was commenced in July, 1904. The books which are offered in evidence go back to 1894.

Cross-examination.

By Mr. GOWEN:

Q. Will you take the books containing shipments made from April 1st, 1898, to April 1st, 1899. Referring to the book marked "tidewater I. C. M. Coal" and to page 400, there are entries made showing shipments, and in the column marked "shipper" the word "Allport" is written. What does that refer to?

A. The party from whom the coal was purchased at the mines.

Q. There are running on through the following pages the name "Allport" found in the same column and other names, such as Heins, Black Lake, Lambirth, and others. Do those other names indicate also persons from whom purchases of coal were made by the International Coal Mining Company?

A. Yes, sir.

Q. In the book marked "Manifest No. 2. International Coal Mining Company," which book I understand refers to shipments made to other than tidewater points, there are various columns with these headings, "Heins," "Harvey," "Lambirth," "Black Lake," "Allport." Do those columns indicate names of the companies, partnerships or individuals mining coal, from whom the International Coal Mining Company purchased coal?

A. Yes, sir.

Q. In this same book there is a column marked "Consignments" in which various names are given. Do those names indicate the persons to whom the coal was shipped, the consignees of the coal?

365 A. Either to whom or for account of whom the coal was sold.
Q. What is the distinction between to or for the account of whom it was sold?

A. In some cases those entries do not contain the party to whom consigned, but for the account of a buyer who did not represent the receiver of the coal in destination.

Q. I find an entry under date of July 18th, 1898, of a shipment made to Hudson, New York, the books stating that the shipment was

made from or by Allport, and the name given in the consignment column being Henry C. Shields. What relation had Henry C. Shields to that shipment?

A. He was the buyer, and ordered it shipped to Hudson.

Q. Do you know, as a matter of fact, whether all the names given in that book after July, 1898, in the column marked at the head "Consignment," are names of those who were purchasers of the coal?

A. I would know in each individual case, but not as a whole.

By the COURT:

Q. You would not know unless you examined them?

A. Not without examination.

By Mr. NEWLIN:

Q. Those are the original books showing the shipments in July?

A. Yes, sir.

Q. You prepared schedule A out of those books?

A. Yes, sir.

Q. Those books do show the making of all shipments specified in schedule A, giving the date, the weights, the manifest
366 load and total tons, and the initial point and also the delivery point in every one of them?

A. Yes, sir.

Q. They are correct, are they not?

A. They are.

Mr. NEWLIN: I offer the books in evidence in support of the testimony of this witness that he prepared the schedule.

Mr. GOWEN: I have no objection to make to any of them which comes within the six year period.

The COURT: As to the shipments within six years, they are admitted for the present.

Q. It is stated in the plaintiff's statement as follows, page 15 of the printed record: "The quantity of coal shipped by plaintiff and carried by defendant, as specified in schedule A, amounted during the period covered thereby to 190,655 gross tons." Is that correct?

A. Yes, sir.

Q. You swore to this plaintiff's statement after schedule A had been prepared by you?

A. I did.

Q. It is further stated in plaintiff's statement as follows: "The plaintiff says that the defendant did then and there and during all the time aforesaid, unduly, unreasonably and unlawfully discriminate against the plaintiff in the transportation of the said coal, in this, that the defendant, to the great injury and damage of the plaintiff, did charge, demand, collect and receive from or for the plaintiff for the shipment of said coal a sum in excess of that charged and collected by the defendant from others, from the same place to the same place, upon like shipments under similar conditions and during the same period of time, which is forbidden by the Interstate Commerce Act." Is that statement true?

(Objected to. Objection sustained. Exception noted for plaintiff.)

367 Q. In regard to these shipments by rail, what was the method of paying the freight?

A. In some cases it was a prepayment of freight.

Q. Speaking of all rail shipments, what was the custom and method of paying the freight?

A. Prepayment only to points where the destination was at a point where there was no agent for the railroad company. The freight followed the coal.

Q. Freight was collected by the Railroad Company from the consignee on account of the shipper, to wit, the plaintiff, the International Coal Mining Company. That was the custom, was it not?

A. Yes, sir.

Q. That applied to all the shipments in schedule A except if any of them were prepaid?

A. Yes, sir.

Q. Can you point out any that were prepaid?

A. By minute examination of the books, I might.

Q. By examination of schedule A as it stands, does it occur to you that any of these shipments were prepaid? Were they not all shipments that were on freight that was collected by the Railroad Company from the consignee of the plaintiff on account of the plaintiff?

A. Practically all.

Q. In all these shipments was the open tariff then existing, the rates thus fixed, paid through the consignee for account of the plaintiff to the Pennsylvania Railroad Company?

A. Yes, sir.

Mr. GOWEN: I understand this testimony is being taken in No. 69?

Mr. NEWLIN: It is being taken in all, is my understanding. Does your Honor rule that all this testimony is taken now in No. 69?

The COURT: Yes; No. 69.

Mr. NEWLIN: And No. 25 is to be kept in a condition to dispose of as a matter of law?

368 THE COURT: Yes.

By Mr. NEWLIN:

Q. It is a fact, is it not, that prior to April 1st, 1899, your company did during the period extending over the first shipment to that period, that your company presented claims for rebates from time to time and did get some rebates during that period of time?

A. Yes, sir.

Q. And was it not commonly known that everybody was getting rebates of some amount during that period, as a common thing?

A. Yes, sir.

Q. That was a matter of common knowledge in the trade, was it not?

A. Yes.

Q. Take now the case after April 1st, 1899, and down to the last

shipment in 1901, were claims presented to the railroad company for allowances for rebates on these shipments?

A. Not through all that period in the regular form that claims were previously made.

Q. In what way was it done, to cover that latter period?

A. By application to the usual officer of the railroad.

Q. Who is that?

A. Mr. James G. Searles, coal freight agent.

Q. Now, on the shipments made prior to April 1st, 1899, through what was the application made by you for the payment of rebates?

A. The same office.

Q. Through Mr. Searles?

A. Yes.

Q. What was the course of proceeding, what would be done; what would the International Coal Mining Company use as a basis of rebate, what evidence did you furnish?

A. A statement showing date and origination of shipment, 369 the weight, car number, initial point of destination.

Q. Did it show what had been collected through your consignee for freight on the shipment?

A. Not always. It sometimes did and sometimes did not.

Q. Well, a claim was made, but for a specific sum, or was it an open claim?

A. It was for a price per ton that would put us upon the basis of other shippers.

Q. That is what you understood was the basis of other shippers, is that it?

A. Without an understanding what there is there. It was made for an amount that would equal that, whatever it might be.

Q. In what way was it conveyed to you when a particular rebate was allowed, in what way was it conveyed to you that the amount fixed in that way for return of part of the freight was putting you on a par with other shippers?

A. We were told that.

Q. Who told you that?

A. Mr. Searles.

Q. Now, I want to know whether he continuously told you that of a period covering all of these shipments; did it cover the whole period of time from time to time, making these statements?

A. Yes, as a rule. That question was not always presented at every meeting.

Q. But I am speaking of the course of business from time to time as these statements took place and rebates were allowed to you?

A. Yes, sir.

Q. So that the information furnished you by Mr. Searles was that you were being put on a par with other shippers?

A. Yes, sir.

Q. Now, does that cover all the way back to the beginning of these shipments, 1894?

370 A. Yes.

Q. Now, when it came to arriving at an amount that you

should get back, what was the method of arriving at an amount; what took place between you and Mr. Searles on that subject?

A. It was a price per ton agreed upon.

Q. But how was it agreed upon; what was the course of conversation which preceded your agreeing, between Searles and yourself, that you ought to get back so much a ton; what took place between you?

A. Well, with reference to certain points it was thought an amount per ton—

Q. When you would go there and ask for a certain amount of a rebate, what argument did you use with Mr. Searles to induce him to grant it to you, and what would he say in reply that preceded the amount being fixed?

A. The canvass for sales in the market evidenced that there was an allowance made to other shippers, and the questions were then "Are we to be upon the same basis?"

Q. That is, your question to Mr. Searles?

A. Yes.

Q. That was the proposition you submitted to Searles?

A. What you have just stated, that the canvass of the market showed that other people were getting rebates and you wanted to be put on the same basis; was that so?

A. Yes, sir.

Q. Then the question arose "What was the same basis?" did it not?

A. Yes, sir.

Q. Now, tell how that arose; what was said by Mr. Searles with a view to showing you what was the basis on which prices were being made at the time to other shippers between the same points?

A. Well, summing it up, it meant that—what was said meant that we could have a certain amount per ton to particular
371 destinations without being recited and named in the conversations; but none of it given in writing.

Q. Is it not a fact, however, that the statements that you submitted in the shape of claims to Searles' department did give all the details of the shipments, as you have said a while ago, and could not from that the allowance of so much a ton demonstrate exactly the basis of settlement; would not your claim show the entire transaction?

A. Yes.

Q. Was it not the custom when a claim, for instance, of your company, was allowed, that that claim after being discussed and an amount per ton agreed upon between yourself and Mr. Searles, that Mr. Searles caused his clerks to verify your statement of your shipments by comparing that with the evidence in his own office, so as to see whether your claim of shipment made corresponded to the railroad company's evidence of shipments made by you?

A. That was evidence to me from the occasional corrections of weights—

Mr. GOWEN: I want a direct answer to that.

Q. (Repeated by stenographer.)

A. I, of course, do not know what work was done on our statements by the railroad company, except that occasionally there would be a correction of weight or some small error in the statements corrected, that indicated an examination.

Q. And those errors corrected were then made the basis of the agreement of the allowance of the rate per ton as adjusted?

A. Yes, sir.

Q. And that rebate was paid whenever it was allowed?

A. Yes, sir.

Q. And it was on the occasion of such payments that
372 these statements were made by Searles that you were put on the same basis as other shippers?

A. Yes, sir.

Q. That is to say, referring particularly to your competitors?

A. Yes, sir.

Q. Did you in any instances complain of any particular shippers who you thought were being discriminated in favor of and against yourself, in your conversation with Searles; did you refer to any company?

A. Frequently.

Q. Name some of the companies as to which you contended with Mr. Searles that they were being discriminated in favor of and against you, just name some of them?

A. Some of those mentioned in the bill.

Mr. GOWEN: Do not read them to him; let him testify.

Mr. NEWLIN: He has sworn to this paper, and I ask leave to show him the statement.

The COURT: He has now said some of those named in the bill are the names that he mentioned in his complaint to Searles.

Mr. NEWLIN: Yes. We want to identify them in the notes as we go along.

The COURT: What for?

Mr. NEWLIN: For the purpose of showing it was these very companies as to which we are making——

The COURT: He has said so. He said some of them named in this statement.

Mr. NEWLIN: May I ask now the names as they occur in the plaintiff's statement, to refresh his memory?

The COURT: Ask him.

373 By Mr. NEWLIN:

Q. (Plaintiff's statement, printed record, shown to witness and his attention is called to page 18 of the printed record.) Read the second paragraph of this plaintiff's statement, and state what you have to say as to the names of the companies referred to in your previous answer just given; has that got a list of the shippers in it?

A. Yes.

Q. Read out the name of any shipper that you claimed with Searles that they were getting better treatment than you were

getting from time to time as rebates were allowed to the International?

A. From time to time the matter would be with reference to the Berwind-White Company.

Q. What is the full name?

A. Berwind-White Coal Mining Company, Sterling Coal Mining Company; W. H. Piper & Co.; Morrisdale Coal Mining Company, Loyal Hanna Coal & Coke Company, James L. Mitchell & Company, Mitchell Coal & Coke Company.

Q. Any more?

A. Those are particular.

Q. Now, I understand these were the conversations, and these are the companies concerning which when you got a rebate it was claimed by Mr. Searles you were getting as much, being put on the same par as these other companies; is that so?

A. Yes, sir.

Q. Did these statements from time to time cover practically all of your shipping periods as set forth in Schedule A from start to finish?

A. Yes, except that as I said in the reference to latter dates no particular set form of claim was presented, but the subject of our shipments and the last shipment were discussed with reference to an allowance to be made for the last—

Q. Well, give the discussion which took place between 374 you and Mr. Searles at that time as to these shipments after April 1st, 1898, was it not?

A. Yes. April 1st was always the beginning of a coal year when tariff rates were changed. New notice was published for the year beginning April 1st. The discussions were always pretty frequent and about the time of the change of tariff. We were always warned particularly not to allow any contracts, sales of coal, to overlap the period of April 1st in any year.

Q. Now who gave you those instructions?

A. Mr. Searles and Mr. Joyce both.

Q. Mr. Joyce?

A. General Freight Agent.

Q. Mr. Joyce was general freight agent during your earlier freight shipments?

A. Yes, not after this date.

Q. Were you at any time permitted to make overlapping contracts?

A. No, sir; it was forbidden.

Q. Now, take an average of the allowances that you got through Mr. Searles during the entire period, and referring to the plaintiff's statement, printed record page 16, where you claim that between the period named, that is to say that is the claim of discrimination for certain periods was \$.15 a ton, and certain other periods \$.45 a ton on various shipments, just refer to that and then state your explanation of what that means?

Mr. GOWEN: Your Honor, I think it would be much fairer if you could have the witness' recollection,

Mr. NEWLIN: It is directly within the rule of your Honor a moment ago.

Objection withdrawn.

A. We judged we were discriminated against prior to the date of April 1st, 1899, equal to \$.15 a ton. If my memory
375 serves me correctly that was the date, April 1st, 1899, when the tariff was very materially advanced.

Q. How much was it advanced, can you tell from the same paragraph how much it was advanced?

A. \$.45, I think.

Q. Then I understand you to say that prior to this advance of \$.45 a ton, which was after April 1st, 1899, you claim that the discriminations against your shipments was \$.15 a ton, and that afterwards it was \$.45 a ton; is that what you mean?

A. Yes.

Q. Now, going back again to Searles' statement to you from time to time prior to April 1st, 1899, shipments prior to that time of those companies, I understand you to say are covered in his designation of the companies that were treated just like you, just like the International?

A. I so understood it.

Q. From what he said to you?

A. Yes.

Q. And you acted upon that belief?

A. Yes.

Q. When did you first learn or get any definite information that would lead you to suppose that these other shippers were getting greater rebates than you were, and what were the occurrences or matters that made you suspect that? I am speaking now before you ever got any actual evidence?

A. A shipper meeting me in the street told me that contracts were continued——

(Objected to.)

The COURT: You cannot tell what people told you.

Mr. NEWLIN: No, but we will fix the time when he began to suspect.

The COURT: He can fix the time, but he cannot relate the conversation.

376 By Mr. NEWLIN:

Q. Leaving out what the conversations were, the hearsay between yourself and any one else, state about when it was and through what sources, without repeating the language, through what sources you got information from shippers that led you to suspect that others were getting greater rebates than you had been getting?

Mr. GOWEN: That is directly within the line of your Honor's ruling. He is asked to state what information he got from shippers.

The COURT: He is asked now when his suspicion was aroused.

Mr. GOWEN: I do not object to that, but he was asked to give what instances.

The COURT: He is not to tell what his shippers said. What date was it?

By Mr. NEWLIN:

Q. When did you begin to doubt Mr. Searles' statement about the treatment of yourself and other shippers that you were all treated alike?

A. After the expiration of the coal year, which you understand is from April 1st to April 1st. I learned from outside sources that contracts were continued over past that period on the basis of the former years in spite of an increase in the tariff, a very material increase in the tariff.

Q. How much?

A. Forty-five cents for the new year, and shippers were privileged to make up what they lacked in shipments on their contracts in previous years expiring the end of March. It was evident that they were having a very great advantage if those contracts were protected.

Q. Well, if the increase of forty-five cents a ton on the freight between the shipping points in schedule A, did you after that increase go into the Pennsylvania Railroad Company, into Mr. Searles' office and endeavor to get the benefit of a reduction or repayment of the increase, the same as you understood others were getting?

A. Yes.

Q. Now, did you state that to Mr. Searles?

A. Yes, sir.

Q. You went then and complained to him of your hearing of the making of these overlapping contracts?

A. Yes.

Q. And you called his attention to the fact that you had been repeatedly refused permission to make them yourself for the International?

A. Yes, sir.

Q. And you objected to other companies being allowed to do it?

A. Yes.

Q. Now, that was after April 1st, 1899, was it not; the increase was after that time and your complaint was after that time?

A. Yes; but I think the overlapping contract business—I cannot tell what date that came to me first.

Q. No, but the date you did have and the date you are referring to now, when you made this complaint to Mr. Searles was after April 1st, 1899, about these overlapping contracts?

A. Yes.

Q. And he refused to allow to you what you claimed was being allowed to other companies, you naming them, some of them, to Mr. Searles?

A. Yes.

Q. Just state what his excuse was?

A. It was that we had not—

Q. Just state the whole conversation, what you told him, and what he said to you?

A. I cannot do that.

Q. Well, as nearly as you can.

A. But the statement was that unless our coal was under contract, although contracts expired the first of April, unless they were
378 under such contracts, instead of having as we had at the time everything expiring because of the custom to have them expired at that date every year; we had no hope of shipping from there to any particular destinations.

— Why had you no hope? Was it in accordance with the instructions of the railroad people themselves that you did not make overlapping contracts?

A. Yes. We did not expect to make up anything on previous years, especially as freights had advanced.

Q. Then you found yourselves in this position, that following the instructions of the railroad company to make no overlapping contracts, and other people making them, they got back the forty-five cents a ton increase and you complained of that very thing to Mr. Searles?

A. It was not so much that all the people named made overlapping contracts. They made contracts to expire in the usual way, in most cases. Some shippers may have had the privilege of overlapping contracts for previous periods that it was well understood that they were to overlap, but we did not know that until after this time came.

Q. This freight raise?

A. With one exception.

Q. You did not learn it until after this freight raise?

A. With the exception of certain furnishing of coal to steamships for their own use, especially those contracts were not always made from April to April, but they were made in the Fall and continued for a period, in our case to tramp steamers, that is steamers that do not fly between particular points all the time, but go the world over.

Q. Between what period were those contracts made?

A. Those contracts varied in their period.

Q. That was the beginning and ending?

A. Yes, sir.

Q. But they did not overlap?

379 A. They overlapped in some cases.

Q. But they did not overlap more than the year; that is to say, if they began in the Fall instead of in the Spring, they would continue until the following Fall?

A. Yes. They were supposed to be outclassed on the first day of April.

Q. In other words, the first day of April succeeding these very contracts you speak of with tramp steamers were supposed to come to an end?

A. Yes.

Q. Now, I want to get at the statements made by you to Mr. Searles when you complained about the overlapping contracts being

allowed to other people and refused to you, when the freight raise came on of forty-five cents a ton when you claimed then to get back forty-five cents, too, did you not claim that?

A. Yes.

Q. And that was after April, 1899?

A. 1899.

Q. And you were refused the payment; they refused to pay you back the forty-five cents?

A. Yes.

Q. And Mr. Searles did admit, did he not, that others having overlapping contracts were being allowed the forty-five cents rebate, because the contracts were still unfilled?

A. Yes.

Q. He admitted that himself?

A. Yes.

Q. And that was the bone of contention between you and him at the time after April, 1899?

A. Yes.

Q. Now, did you prior to that have anything in the shape of evidence or knowledge that this thing was going on, until this great increase came?

A. No.

Q. Now, in regard to other discriminations not included in the category of overlapping contracts, I want to know when it was and through what source that you first began to disbelieve the statements that you say Mr. Searles made to you from time to time that nobody was treated any better than the International as to the rate; that is, leaving out the overlapping?

— That is a hard question to answer. I do not understand it.

Q. Well, as near as you can get at it. All this relates to the question I am asking you now—the question I am asking you now relates to the shipments made between the first shipment of April 1st, 1894, and the shipments made up to March 31st, 1899. Now, covering that period, when did you first begin to doubt Mr. Searles' previous statements to you, that you were treated as well as any other shipper?

A. I cannot say that I doubted Mr. Searles' statements in a direct manner.

Q. You are speaking now not of what was the operation of your own mind, but what you said to Searles. You mean you did not contradict him flatly to his face; is that what you mean?

A. Well, I do not want to make the statement that Mr. Searles did not tell the truth, but he did not tell the whole truth.

Q. All right, we will put it at that. When was it, about what period of time, that you became convinced that when Mr. Searles told you that you were being treated on a par with these other shippers whose names you have mentioned, when was it that you got an idea that he was not then from time to time telling the whole truth and wherein he was not telling the whole truth? Now, when did you get that idea in your head?

A. That was with reference to shipments very much earlier than 1898.

Q. Well, what year?

A. I do not know.

Q. Well, what circumstances brought the matter to your attention, and what did you say to Searles about it?

A. Well, that while we had received a rebate, we did not receive a large enough one to be on a par with others.

Q. Now, about when was it you began to urge that proposition upon Mr. Searles?

A. In the earliest part of our whole experience.

Q. Now, in the very earliest you told him that, and what was his reply; did he admit that others were getting more, or did he continue to say you were getting the same as others?

A. In some cases that we were not getting as much as others, and would receive more and did receive more.

Q. That is, he made it good.

A. Yes.

Q. All of those things he had admitted?

A. Yes.

Q. But as to others, did he admit that they were getting more or did he deny it?

A. Well, a great many denials of anybody getting more.

Q. Now, when did you first gain any real evidence that any shipper was getting greater rebates than the International, and how did it come about?

A. I cannot give the date.

Q. Well, had you not a proceeding in the Court of Common Pleas No. 2 on the State shipments?

A. Yes.

Q. Was there any evidence produced there out of the books of the company showing greater payments of rebate to other shippers than to yourselves?

A. Yes, sir.

Q. Now, that came out on the production of papers on the trial before Judge Wiltbank?

A. Yes.

Q. And that was in 1904, in the Fall of 1904, was it not?

A. Yes.

Q. And that was the first time that you had any real evidence of the payment of rebates greater than the payments to yourselves?

A. Yes.

Mr. NEWLIN: Now, there has been an objection made, if the Court please, to shipments that would be barred by the statute if there were no fraudulent concealment, and I submit that the whole of the documents should be offered in evidence and received in evidence without regard to the statute, on account of the fraudulent concealment we have just shown through the witness. It covers the entire period.

By the COURT:

Q. You say you got rebates?

A. Yes, sir.

Q. Well, were those rebates according to the advertised schedule, were you lawfully entitled to them?

A. The schedule did not state any allowance from the tariff.

Q. Then you were taking illegal rebates, too?

A. Not so understand it, no, sir.

Q. Were they the same as were given to your competitors?

A. That was our understanding.

Q. Well, everybody getting the same thing, was it?

A. Supposedly so.

Q. Well, upon what rate were you getting it; were you taking the rebates that were prohibited by the Commerce Act?

A. No, sir; they were not.

Q. Prohibited by the Commerce Act at that time; they were not?

A. No, sir.

Q. What your competitors got, were they prohibited by the Commerce Act?

Mr. NEWLIN: Your Honor is asking a layman a question of law. The plain proposition here is that everybody was getting
383 rebates at that time, and they all paid in a certain rate and got something back, and it was rebated. That was not forbidden by law to take rebates, not at that period. It forbade a railroad company giving rebates, but it did not forbid a shipper, if he could get a reduction on the freight, of getting the benefit of that reduction when everybody was getting it. That was not forbidden by law.

The COURT: Did not the original Commerce Act prohibit the giving of rebates?

Mr. NEWLIN: It does not prohibit the giving of the receipt of a rebate. Now this was a common thing. The whole trade was getting back something, and when these people got back——

The COURT: Then it comes to this, that your client and his competitors were engaged with the defendant in violation of the law, and the defendant did not violate it to the extent for your client that he did for his competitors?

Mr. NEWLIN: That is one way of putting it.

The COURT: And therefore you are here complaining about it?

Mr. NEWLIN: That is one way of putting it, but it is not the fair way, I submit, to put it to the shipper.

The COURT: I do not put it to him; I put it to you. That is the situation?

Mr. NEWLIN: The situation is simply this. When these people moved their freight they were required to pay through their consignee so much money. Everybody was treated the same way, so far as that is concerned in paying a fixed sum whatever it might be. Then everybody in the trade would come back and get some of that

384 money back again from the railroad company and it was a perfectly well known thing in the trade and was done every day by everybody. The question was whether the reduction was to a sum that was equal, that is it.

The COURT: Well, the objection that the plaintiff is not entitled to prove damages as a result of discrimination on shipments prior to a period of six years before instituting suit is sustained for two reasons. First, from the evidence adduced it shows that both the plaintiff and his competitor were taking a rebate, if a rebate at all, from the defendant, in violation of law, both illegally accepting an illegal rebate or a rebate which the defendant, from the evidence, had no legal right to pay; and, second, because from his evidence he shows that he knew that he was being discriminated against in the way he states from his earliest experience in the coal trade, and therefore was not justified, and the statute of limitations applies in this case, excepting for the plaintiff.

By Mr. NEWLIN:

Q. Now, Mr. Wilson, did you at the time of any of these payments out of which you got repayments, did you of your own knowledge know at the time what was the posted Interstate Tariff Rate filed with the Interstate Commerce Commission?

(Objected to.)

By Mr. NEWLIN:

Q. Do you know that of your own knowledge?

Mr. GOWEN: He is charged with notice of the tariff rate.

The COURT: We will find out whether he did.

(Objection overruled.)

A. The tariffs have a mark on them that they are published under the Interstate Law; as far as I could tell.

385 By Mr. NEWLIN:

Q. But as these shipments were made from time to time, had you examined from time to time as the shipments were made, any posted rates under the Interstate Commerce Commission, or did you take whatever the railroad company charged and afterwards get back whatever you could; that is the proposition?

A. We were governed always by the tariff sheets issued by the railroad company, and at a certain period they were filed with the Interstate Commerce Commission, I presume, because they had such a mark on the face.

Q. But when you made a particular shipment and it appeared from the transaction that your consignee would have to pay so much a ton to take the coal to that particular consignment point, had you then inspected the tariff sheet, or did you take what the railroad company charged you first as what you would have to pay and get back what you could?

A. We were always governed by the tariff sheets and consulted

it at all time in making shipments, because our sales were based on the delivery price.

Q. Now, state whether from any information coming to you from Mr. Searles or any other railroad official you knew that all shippers were getting some rebates during the whole period covered by your shipments?

A. No, sir; I did not know it.

Q. Well, when did you first begin to know it; that is what I want to get at.

A. 1894 or 1895.

Q. From that time on you knew that the trade generally were getting allowances off of the rate that was charged and collected by the railroad company?

A. Yes.

Q. You knew that was a general thing throughout the whole trade; did you know that from your connection with the railroad officials in getting rebates for yourselves?

386 A. Yes.

Q. Discussing the claims that they allowed to other people?

Mr. NEWLIN: Now, I submit that where it is shown from the statements that this witness says came to him from the railway officials that the reductions and allowances were given to the whole trade, that the shippers were in such a position that they were quite justified in taking what they could get, or they would have to go out of business.

Q. What would have happened to you if you had taken no rebates at all?

A. Could not have done any business.

Mr. NEWLIN: I submit this as a common sense proposition. We are confronted with a statute and we are confronted with a condition of things, and we have here a railroad company holding up a shipper and compelling the shipper as a price of getting his coal moved at all to pay so much a ton for his coal through his consignee, and that railroad company then voluntarily paying back some and paying back more to others. I take it that that railroad company is estopped from raising any question as to the validity of the repayment, and that the condition in which the shippers were put justified them in taking what they could get, and that as a discrimination it did not make it any the less a discrimination to have other people getting more.

The COURT: I do not change that ruling, but I simply state that the objection to proof of shipments beyond the statute is overruled for two reasons; the first was as stated, that they had knowledge according to the evidence here of illegally taking rebates; the second is that he knew that there was a discrimination. He says from the beginning he suspected.

387 The WITNESS: Almost.

The COURT: He said from the beginning, was it not?

The WITNESS: Almost the beginning, your Honor.

The COURT: He knew or had a suspicion or knowledge that there was something wrong, but he did not know it positively until 1895, so that even upon that ground he had, it occurs to me, a sufficient notice to make him act within the statute, and the objection is sustained.

(Exception is granted for the plaintiff.)

By Mr. NEWLIN:

Q. Now, Mr. Wilson, coming to the shipments made after April 1st, 1898, was that the last period in which you got rebates?

A. No, we received some allowances on business of that year.

Q. Of 1898?

A. Yes.

Q. Now, when did you cease to receive any at all?

A. On the business beginning April 1st, 1899, as I remember it.

Q. Well, that is what I asked you, whether they had not ceased April 1st, 1899; there were no rebates paid to you after April 1st, 1899?

A. That is my recollection.

Q. This forty-five cents of a rise in the tariff took place April 1st, 1899, did it not?

A. Yes, sir.

Q. And the following year it was increased to fifty-five cents an additional ten cents?

A. Yes.

Q. So that from April 1st, 1899, the rate was increased forty-five cents a ton, and from April 1st, 1900, to fifty-five cents a ton above previous rates?

A. Yes.

388 Q. And that continued up to the period of all your shipments, which is up to April 1st, 1901?

A. Yes. We did not continue in business quite so long as that.

Q. But you made some shipments in 1901?

A. Yes.

Q. Now, will you just read off, or have you prepared a schedule showing shipments made after April 1st, 1899, to South Amboy?

A. Not except as is shown in the schedule.

Q. Just read the shipments made after April 1st, 1899, to South Amboy. I want to get the tonnage and then we will claim there is forty-five cents a ton from the first period and fifty-five cents from the other?

A. April 1st, 1899, to April 1st, 1900, shipments to South Amboy engaged for reshipment, 15,708 tons.

A. April 1st, 1900, to July 1st, 1900, 3,231 tons, and July 1st, 1900, to April 1st, 1901, 9,963 tons.

Q. Now as to all of that didn't you pay on the first period the increase of forty-five cents a ton and on the second period the increase of fifty-five cents a ton?

A. Yes.

Q. Did you get any of that back?

A. No.

Q. You claimed it, however, with interviews with Mr. Searles?

A. Yes.

Q. And you claimed interviews with Mr. Searles that other shippers were getting back the forty-five cents and fifty-five cents respectively that you were claiming?

A. Yes, sir.

Q. And I understand you to say he admitted that, but claimed that it was done by reason of these companies having contracts that overlapped the freight year?

A. Not in every case overlapping the freight year, as I understand many of them naturally expired with the first of April, 389 but the shipments being what they could claim as uncompleted,—however that was manipulated, they would make a claim that they were uncompleted and make further shipments on account of that contract.

Q. Then there were two classes that Mr. Searles admitted were receiving the forty-five and fifty-five cents respectively, namely, one where a contract expired, the time of delivery expired, but the delivery had not been completed?

A. So claimed.

Q. And that in those cases there was an allowance of forty-five or fifty-five cents just as if the contract itself overlapped?

A. Yes.

Q. That was his admission to you?

A. Yes.

Q. Then in other cases what?

A. In other cases the contracts were made for terms of years, but we were not aware of that at that time.

Q. Now, you say you knew nothing of that, the allowance of contracts running for a course of years, until you had this conversation with Mr. Searles in 1900, or after April, 1899?

A. About that time.

Q. That is the first information you got of that, the first knowledge you had of it?

A. Yes.

Q. Now as to what company did Mr. Searles admit in this conversation with you which we will refer to as overlapping contracts, as to which companies did he admit that such payments were made?

A. I do not remember that any names were used by him.

Q. Didn't you in talking with him claim that certain companies, naming them, were getting this privilege?

A. Yes.

390 Q. Now, what were they?

A. I could not recollect that.

Q. Were they any of those named in the list that you name in your plaintiff's statement?

A. Yes.

Q. Just turn to that page 18.

A. (Referring to document.) I could not tell which now were referred to in any conversation.

Q. In regard to overlapping, but the subject was treated of and the admission was made that some were getting them?

A. Yes.

Q. Did you know at any time or learn at any time, and if so when, of any allowance to particular companies which you claimed to be a discrimination in relation to spurs or laterals or branch roads of any shippers bringing their coal to the Pennsylvania Railroad Company?

A. No, sir.

Q. I mean prior to filing your plaintiff's statement.

Mr. NEWLIN: I want to know whether he had knowledge, because he has had knowledge since then, through the proceedings of the Interstate Commerce Commission.

The COURT: He said "no, sir."

The WITNESS: No, sir.

Mr. NEWLIN: I want to show he had no such knowledge prior to the bringing of this suit.

Q. Now, have you followed since this suit was begun, the proceedings before the Interstate Commerce Commission, where there were hearings here, where Mr. Glasgow represented the Commission?

A. Yes, several meetings.

Q. Do you recall getting any information there as to the arrangements made, for instance, with the Altoona Coal & Coke Company, by which they were getting an excessive allowance for cartage of coal to the railroad company; do you know anything about that?

A. I have not retained any part of it in my memory. I recollect something of the kind being brought out in the evidence.

Q. But you knew nothing about it when you brought this suit?

A. No.

Mr. NEWLIN: It seems to me, if the Court please, we have certainly got to a point where we can properly go into this question of whether, for instance, the Berwind-White Coal Company and others that were getting rebates at a period after the time that this Company was getting any, that we have a right to go into this evidence that is here and show what has been produced under the rule to produce.

The COURT: You can go ahead and ask him, of course whether the competitors named in the statement got a rebate.

Mr. NEWLIN: We presented petitions in which we alleged that the Railroad Company was in the possession of evidence showing that it paid these; for instance, these overlapping contracts paid the difference in the freight increase and the former rate to persons having overlapping contracts and refused to do so to this plaintiff, and that constituted a discrimination. Now, then we propose to show that this took place and we asked then—

The COURT: I think that is competent to show it. Go ahead and show it.

Mr. NEWLIN: Now, then, that brings us up to the very point your Honor stated a while ago that until we had proceeded further there

392 was nothing before the Court that we needed any evidence of anything that was called for by the rules to produce. Now, we have got to the position where we do need it and the question arises, there being an order to produce a certain thing, whether it has been produced.

The COURT: Well, go ahead.

Mr. NEWLIN: And on that I want to show by an examination of these things that have been produced that they are not what is called for by the rule to produce.

By The COURT:

Q. Who are your competitors that got a rebate, you say?

A. Berwind-White Coal Mining Company, Morrisdale Coal Company or Mining Company, Loyal Hanna Coal and Coke Company, Columbia Coal Mining Company.

Q. Well, did you examine these papers that were produced here?

A. Yes.

Q. Do they show it?

A. Yes, sir; but many papers——

The COURT: They show it. He says they show what he claimed. Now, produce them.

Mr. NEWLIN: There is only one way of going at that and beginning at the beginning where we were a moment ago.

Recess until 2.15 p. m.

Trial resumed at 2.15 p. m.

J. CHESTER WILSON recalled.

(Cross-examination continued.)

By Mr. NEWLIN:

Q. Turn to page 22 of schedule A, South Amboy shipment from April 1st, 1898, to April 1st, 1899, 24,430 tons. Now, I want you to take out of that all that was from July 29, 1898, to April 393 1st, 1899, that is within the period of the statute. Have you made a calculation from the books?

A. By taking a little time I can get it out of the books.

Q. Have you partially done it?

A. Yes, sir.

Q. What was the result? How much of the figures 24,430 tons which are specified there from April 1st, 1898, to April 1st, 1899, how much of that was after July 29th, 1898?

A. I cannot answer until I finish the calculation.

Q. How near are you to finishing it?

A. I only just touched it.

Q. You only began it?

A. Yes, sir.

Mr. NEWLIN: Now, if the Court please, there may be a great deal of time saved in this way for this witness to make a calculation in

answer to this question during the recess, subject to cross-examination on the result, and do the same as to any other division of other parts of the schedule which I will ask him.

The COURT: You can do it after we adjourn.

Mr. NEWLIN: It may be noted that he has leave to do that?

The COURT: He can have it ready tomorrow morning.

Mr. NEWLIN: I offer to show by the same witness as to that portion of schedule A coming after the South Amboy shipments to the end of the shipments, covering all of them that were made after July 29, 1898, so as to bring it within the ruling, and I ask leave to bring in a statement of that kind tomorrow.

Q. Did you examine this book 58 out of the package marked A?

A. Yes, sir.

394 Q. Did you examine it page by page?

A. Yes, sir.

Q. With the exception of three items which you can mention, referring to the Mitchell Coal & Coke Company, are there any allowances mentioned there in that book to any of the other companies that were favored companies in the plaintiff's statement.

Mr. GOWEN: What period does this book cover?

By Mr. NEWLIN:

Q. Go on and give the dates?

A. The book runs from July 2nd, a few pages that I cannot say what the dates are ahead of that.

Q. What year?

A. To September 13, 1900.

Q. Now, first of all, what is that book itself; it is a letter-press book of what kind of letters?

A. Letter-press copies of papers transmitting claims from the coal freight agent.

Q. Just take one of them and read it. It is the form of a printed letter just filled in and it will give a distinct idea of what the letters are. Just take one of those Mitchell Coal & Coke Company.

A. None of them are relevant.

Q. I know, but it shows the form of a letter.

A. Page 64, Pennsylvania Railroad Company. Coal freight department, general offices, Philadelphia, July 9th, 1900. Oscar A. Knipe, Auditor Coal Freight Receipts: Dear Sir: Enclosed herewith are papers relating to claim made by Mitchell Coal & Coke Co. for overcharging on shipments of coal from Glen Campbell to Attleboro Falls, Massachusetts, February, 1900, based on refund of \$14.22 overcharge account of error of agent Bellwood in using Attleboro instead of Attleboro Falls, Massachusetts, as destination on billing. Authority attached. Charge N. Y. N. H. & H. R. R. \$7.11. Please have a draft prepared for amount payable as per your
395 list and send same to me at your earliest convenience. Yours truly, J. G. Searles, Coal Freight Agent. Claim No. 15051.
\$14.22."

Mr. NEWLIN: That claim, of course, is ridiculously small, but it

happens to be in the first book and I have asked to have this letter read for the purpose of calling your Honor's attention in that way clearly to the fact that this letter and all others in this whole bundle refer to the papers of a claim that is transmitted by Mr. Searles to Mr. Knipe, together with the claim papers themselves. Now, the claim papers show where the money was allowed. In this case it was a very small one, it is not worth talking about one way or the other, but I want to object to that paper as not being a compliance with the order to produce, because there is not produced with this letter the accompanying papers which went to Mr. Knipe, and other officials of the railroad company. Now, if we had in connection with this letter of Mr. Searles the accompanying papers that went to Mr. Knipe, we would have the whole story and know what certain remittances were made for. Of course, it is of no importance to this particular thing, but it will be of great importance when we get to other cases where enormous sums were allowed to various companies named, and all in the same way, namely, transmitting claims of the companies to another official of the company, and this letter of transmittal is produced and the accompanying claimed papers of the favored shipper are not produced. Now, that is certainly not a compliance with the order to produce.

By the COURT:

Q. Are there any other papers which you saw, Mr. Wilson, that will explain what these transmissions were for.

A. No, your Honor, not any.

396 Mr. NEWLIN: I will ask him the general question as to the whole of this mass. The whole of this stuff that was presented, with the exception of one package which is tariffs of a period of time that does not concern this suit, with that exception everything here consists of letters, books like that, in the same position. You might take one where a large claim was allowed and get a ruling by your Honor, but there was nothing except this letter book, was there, to explain this transaction?

The WITNESS: No.

Q. And there is nothing except what appears on the face of that letter to show what it was, why the money was allowed. Is there anything else?

A. Nothing.

Q. And is there anything on the face of that letter to show that the money ever was paid?

A. No, sir.

Mr. NEWLIN: So that we have no evidence that the money was paid; we have no explanation of why it was made, because of the non-production of the things that accompanied this letter.

By the COURT:

Q. Is there anything in the other papers that are here to show why it was paid and whether or not it was paid?

A. Nothing beyond the letter itself.

Mr. NEWLIN: There is nothing but the letter itself in every case, If this was produced in some other way and not under the exigencies of a rule of this kind, and that letter was offered in evidence, it would be objected to at once that it was an incomplete thing, because it showed on its face that the accompanying papers which explained it were not produced.

The COURT: Just before adjourning you said that rebates were paid to your competitors.

397 Mr. NEWLIN: It showed there were large payments made; he may have called them rebates.

The COURT: What do you mean by that?

Mr. NEWLIN: There are other packages of books there are 33 volumes of this character, and then there are other volumes where on the following page there is copied an additional paper which looks like a form that has simply the date, the address of the shipper and the amount of money stated and the form that went out with checks, but I was not able to tell that that was the fact, and in that respect these 33 volumes do not show that evidence of payment, whereas — the other volumes that evidence is given of the simple form.

The COURT: In these 33 volumes are these letters concerning monies paid to competitors of yours?

Mr. NEWLIN: Not in the 33 volumes, except in very scattered instances where apparently it was an allowance of a freight rate lower than the tariff.

The COURT: But not to your competitor.

Mr. NEWLIN: Yes, sir; in very few instances in the 33 volumes, I say.

The COURT: How about the other volumes?

Mr. NEWLIN: The other volumes have the evidence on a second page.

The COURT: Let us get at it and see if it shows.

Mr. NEWLIN: I want to get a ruling on whether that is a sufficient answer.

The COURT: It is not to your competitor.

Mr. NEWLIN: Yes, Mitchell is our competitor, this very Mitchell.

398 The COURT: He says in the other volumes they do show. Take them up first and prove all your case you can by the evidence that is here.

Mr. NEWLIN: Before doing that I want to spread upon the notes some important case of this kind in which a large amount of information is given, which clearly indicated the payment of enormous sums of money for rebates, but the letter of transmittal leaves out the connecting points in such a way that there are missing links here and there; for instance, they mix up State shipments with interstate shipments; they call it, or instance, unfilled contracts, or they call it terminal expenses and various names, and there is no tonnage given.

The COURT: I understand, the point is this. Your claim here in the statement is for an injury done to you for, you say, forty-five cents a ton on so many tons of coal shipped by you.

Mr. NEWLIN: Yes, that is this part of it.

The COURT: Now, what you want to show is that your competitors during that time were receiving a rebate of forty-five cents, and the measure of your damages, as I understand it, I may be wrong about it, but as I understand it the measure of your damages is not what they paid to somebody else in total, but the amount of the difference on your shipments. Now, what I understand you want to prove, is that your competitors got a rebate. If these books do not prove it, the others may.

Mr. NEWLIN: What others?

The COURT: He says there are others here, that the 33 volumes do not tell that remittances were made to his competitors, but there are others that do. Is that correct, Mr. Wilson?

The WITNESS: Yes, sir.

399 Mr. NEWLIN: I still fail to make clear a thing on which I want a ruling.

The COURT: Well, I will not rule on it. I understand what you want, a ruling on a book that he says does not show that it was a rebate, but that there are other books here that do show it. Now, get them, and I will rule on them.

Mr. NEWLIN: I will ask for a ruling on this first one and then of course your Honor can refuse to rule. I ask for a ruling on the portion of that book 58 which is now produced by the plaintiffs, that it is a communication from Searles to Kuipe and shows on its face that there is not produced along with the letter of transmittal the claim itself, of which the letter of transmittal is simply a means of taking it from one office to another, and that it is not a compliance with the order to produce.

The COURT: That is true, that it does not show for what these remittances are for to a competitor of the plaintiff, but as the witness says that there are other books that do show what is desired, the book has no relevancy at this time, or at least is not important, and you want an order made, do you? An order is refused to produce further in reference to that book.

Mr. NEWLIN: I ask for an order to produce in connection with that the claims that are transmitted, which appears from this letter were transmitted to another official of the Railroad Company, and it appears from our petition on the rule to produce that we ask for these statements furnished by the shippers themselves, and charge that those very statements which are transmitted are still in the possession of the Railroad Company, and they have not been produced.

400 The COURT: As to the statements referred to in this letter, the motion is refused.
(Exception for plaintiff.)

By Mr. NEWLIN:

Q. Now, Mr. Wilson, suppose you take up the Berwind-White case and begin with the first book which has evidence that looks like the payment of rebates to Berwind-White & Company after July 29, 1898. Begin with that and confine it to the Berwind-White and we will take the other companies up afterwards.

Mr. NEWLIN: I now produce book A-51, being a letter book of Mr. Searles, the coal freight agent, to Mr. Knipe, the auditor of freight receipts, and I ask Mr. Wilson, the witness to turn to any payments made to Berwind-White & Company in that book.

Mr. GOWEN: I understand your Honor to rule the shipments which could be inquired of in the action were those which were made during the period during which the plaintiff was not receiving these rebates. That period ended on April 1st, 1899, so I suppose we had better confine the testimony as to other shippers to that period, because the provision of the Interstate Commerce Act that the services as to which the equality of charge is necessary or enjoined is that which is contemporaneous with the service rendered to another shipper.

Mr. NEWLIN: That very thing will come up in connection with what is left out of these papers.

The COURT: Well, we will hear the evidence here exactly how these payments were. As I understand, you have to show the period of time you claim this rebate was given to your competitors, during all that time that they were receiving the rebates you were paying forty-five cents more.

Mr. NEWLIN: Yes, that is one of the things, but there are other payments made to them that were not on account of overlapping contracts at all, and these things are all mixed up in the different letters of transmittal by being separated from the claims as transmitted, so that the details are not altogether here and are in the other papers shown by this document to be in the hands of the Railroad.

Mr. NEWLIN: Book 53, page 146.

Mr. GOWEN: The witness, as I understand, is asked now to read a statement covering adjustment of rates made with the Berwind-White Company during the month of September, 1898, covering adjustments made with the Berwind-White Company on account of freights paid on coal shipped during the month of September, 1898. I object to any testimony as to that period because it is entirely immaterial at what rate we carried coal for the Berwind-White Company in September, 1898, under your Honor's ruling that the plaintiff has only a right to maintain an attachment with respect to shipments made by it after April, 1899. The fact that we may have carried in September, 1898, at a lower rate than we carried for the plaintiff in April, 1899, is not a violation of the Interstate Commerce Act. We were perfectly justified in carrying at a lower rate in September, 1898, than we charged in April, 1899, whether that resulted from the establishment of a tariff rate which was lower or from the reduction of the tariff rate brought about or due to an adjustment of rebates. The Interstate Commerce Act is clear. Section 2 provides that the carrier's duty is to carry at equal rates in respect to shipments made to the same point and made contemporaneously. Now, the International Coal Company do not establish a right to recover on a shipment which — say- it made to South Amboy in April, 1899, but proving that in September, 1898, we carried to South Amboy for Berwind-White & Company at a lower rate.

The COURT: That is true, but then it may have been some 402 shipments made in April, 1899, by the plaintiff.

Mr. GOWEN: I do not object to that, of course.

The COURT: It seems to me he would have a right to put in evidence any evidence showing that they carried at a lower rate for his competitors at any time within the statute of limitations, excepting that that would be taken care of after the evidence is in and we ascertain exactly what was done by the plaintiff.

Mr. NEWLIN: Your Honor can see at once that if an established rate is given that is lower, it prevents other shippers at any period during its continuance from getting the trade, and that is a part of what is now our claim in No. 69, since you have determined that. I am bringing into No. 69 the single damages, the whole of what was in No. 25 and 69 I have changed that now.

The COURT: The objection is overruled. Exceptions for defendant.

By Mr. NEWLIN:

Q. There are three statements in this book in the month of September, 1898. Begin with the earliest one and read the date and page of the book.

A. Page 142.

Q. What is the date?

A. October 19, 1898.

Q. It is a letter from whom?

A. From Mr. Searles to Mr. Knipe.

Q. Now, read the whole of it just as it stands.

A. "Enclosed herewith our orders relating to claim made by Berwind-White Coal Mining Company for terminal expenses on shipments of bituminous coal from Clearfield region to various points during September, 1898, based on the following rates per 2240 pounds. To Pennyan, Watkins, Benton, Frankford, Amsterdam, 403 Herkimer, Little Falls, East Albany, Mechanicsville, Troy, Schenectady, Fonda, Fort Plain, Olean, Conway Falls, Syracuse, Canandaigua and Newark \$1.35. Black Rock and International Bridge, New York, \$1.60, and Troy, Pa., \$1.00. Humrods on B. & A. supply, \$.25. Sodus Point, F. O. B. \$1.05. Olean, N. Y., \$.80. Wallington for points R. W. & O., 95 cents. Bronxville, N. Y., \$2.35. Newfield, N. Y., \$1.55. Pittsfield, Mass., \$2.05. Waterbury, Conn., \$2.30. Watertown, Conn., \$2.50. Canaan, Conn., \$2.05. Georgetown, Conn., \$2.05. Nantucket, Conn., \$2.30. Lee, Mass., \$2.05. Great Barrington, Mass., \$2.05. Housatonic, Mass., \$2.05. Haydenville, \$2.70. Mt. Vernon, N. Y., \$1.80. Port Chester, N. Y., \$1.80. New Rochelle, N. Y., \$2.00. Please have a draft prepared for the amount payable as per your records and send same to me at your earliest convenience. Yours truly, J. G. Searles, Coal Freight Agent. Claim No. 15725. Amount of money \$19,127.99."

Q. Are there any papers connected with that?

A. The next page is blank, the next is another claim.

Q. Does it appear that it was transmitted with this letter the claim mentioned therein by the number you have just given?

A. Apparently, yes.

Q. Associated with other claims of the same date for different periods and intervals than this named. Now, has the claim been produced, the papers of that claim made by the Company, has that been produced in this batch of papers that you have examined since the 29th of April when they were all offered in evidence?

A. No, sir.

By the COURT:

Q. Now, those points to which they were shipped mentioned in that letter, are they the points to which you shipped and for which you claim a rebate?

A. In some cases, yes, sir. We do not embrace them all.

404 Mr. NEWLIN: Some of them ours and some others, but between the same initial and delivery points.

The COURT: That paper does not show for what that money was returned?

Mr. NEWLIN: There is a great deal more on this same thing.

Q. Is there anything on the face of that letter to show how much per ton was allowed?

A. No, sir.

Q. Is any tonnage mentioned in that letter?

A. No, sir.

Q. Is there any information in that letter from which it can be determined how much per ton was allowed to this shipper by reason of the allowance of this \$19,000?

A. All of the figures read refer to rates, except one in which 25 cents is mentioned, apparently the rebate upon a certain shipment.

Q. What makes you think it is apparently a rebate?

A. Because it is twenty-five cents is the only reason.

Q. Then there is no tonnage given between any of these points?

A. No, sir.

Q. And none stating the rate there. Is there anything to show whether that was the tariff rate or a reduced rate?

A. No, sir.

Q. Is there anything from which you can compute whether that rate was a reduction or not from what you paid?

A. No, sir.

Q. There is nothing on the face of that paper?

A. No, sir.

By the COURT:

405 Q. Did you take those towns mentioned in that letter to which the Berwind-White people shipped, the same towns to which you shipped, or same places to which you shipped, and compare the rate charged there with the tariff rate?

Mr. NEWLIN: He does not know what the rate charged here is. That is just the point.

The COURT: It gives it there, does it not?

By Mr. NEWLIN:

Q. Is it the published rate or the lower rate?

A. Apparently the lower rate.

By the COURT:

Q. Did you take the published tariff schedules and see whether that charge there is the published tariff schedule or not?

A. No, sir; I did not have them.

Mr. NEWLIN: We haven't got them.

The COURT: Didn't you call for them?

Mr. NEWLIN: I called for them distinctly, for the tariff sheets, and then got a bundle of tariff sheets here bound volumes, and they are all for years after shipments.

Mr. GOWEN: I beg your pardon, there has been no order made upon us to produce the tariff sheets.

Mr. NEWLIN: There is no way of determining how much per ton was allowed.

Mr. GOWEN: They show there whatever shipments were made to these points named were settled for at the rates named.

Mr. NEWLIN: We have this point, that the transmittal papers, the important things, are not here.

The COURT: Do I understand, Mr. Gowen, that the rates at which they were settled are the rates per ton to those points, the schedule rate or the rate after the return had been made?

406 Mr. GOWEN: I understand Mr. Wilson can tell us all about that, because he got these settlements every month. These rates were the so-called net rates and represented the actual rate charged.

Mr. NEWLIN: It does not appear on this letter. This is a verbal explanation by Mr. Gowen, who is not a witness.

By the COURT:

Q. Here is a rate to Newfield, New York, \$1.55. That is the rate after the return has been made. Is that the net rate, or the published tariff rate?

A. I suppose—

(Objected to by Mr. Newlin.)

By Mr. NEWLIN:

Q. I want to know whether there is anything on the face of this letter to show whether that is a published tariff rate, or whether it is a reduced rate, whether that appears from the face of this letter, not what you guess, but what is apparent on the face of that paper.

A. No, it does not show.

Q. You say it does not give the tonnage on which this allowance was made?

A. It does not.

Q. Then is there any way, from the face of this paper, of your calculating how much a ton was the allowance which aggregated the total amount allowed of some \$19,000?

A. No.

Q. Does that letter show that the payment was made, even of this \$19,000, on the face of it, not what you surmise?

A. No.

Q. What is it called, terminal expenses?

A. Yes, sir.

Q. That letter of transmittal refers to the claim as being
407 allowed for terminal expenses. Is there anything on the face of this letter to show what was meant by terminal expenses, what the terminal expenses allowed for consisted of, and why they were allowed?

A. No, sir.

Q. Is there produced in connection with this allowance any check, draft, voucher, or any other paper whatever that had relation to this allowance set forth in this particular letter?

A. No, sir.

Q. You do not know whether it was really granted or not, so far as this letter is concerned?

A. That is right.

Mr. NEWLIN: On that I ask the Court to rule that the production of this letter of transmittal, showing on its face a lack of all the essential things for the purpose for which it is called, is not a production called for in compliance with the order of April 2nd, 1907, which calls for everything that is connected with the subject matter and necessarily all that is shown to exist by this letter itself, it appearing from this letter itself that the claim itself with its details simply went from this office of the railroad company to another office of the railroad company, so that the original of the letter of transmittal and the original of the claim were there, and there is nothing more to do but for the company to produce the claims as well as the letters.

The COURT: Has the company those itemized statements of claim?

Mr. NEWLIN: I want you to rule this is not a production, and my contention is that they cannot now go into the question whether they have these papers or not, since in the petition for the order on which production was directed, we distinctly aver that they had these papers then, and they did not deny it, and that was an admission that they had them. If they did not have them they should have brought that question up then, and not now.

The COURT: You called for papers in an indefinite man-
408 ner, to show that there was a rebate returned to your competitors that was not returned to the plaintiff. They produce a paper and say it shows it. You say it does not show it. I am not going to rule that they have not complied with that order until they have a chance to see whether they have complied with the order, because a refusal to comply with the order involves a

judgment in your favor, and when we find out that they refuse to comply then we will rule accordingly. But we are going to give them a chance to see if they have complied, and I am not sure they have not complied if I understand what Mr. Gowen has stated.

Mr. NEWLIN: I ask for the production of the original claim mentioned in this letter.

(The question was then argued at length.)

The COURT: The plaintiff reads a letter dated October 19th, 1898, remitting a claim made by this company to the auditor by Mr. Searles, which letter refers to the statements of claim made by the Berwind-White Coal Mining Company for shipments of coal to points similar to points shipped to by the plaintiff. Defendant's counsel reply that they cannot produce those original statements of claim, that they have been destroyed, and say that a witness, Mr. Knipe, who is in Court ready to testify as to what became of those claims and when they were destroyed, knows all about it. Plaintiff's counsel replies he will not call witnesses from that side. In view of the circumstances and the statement of counsel that they have been destroyed, the request of plaintiff to rule that the production of the letter and similar letters from Searles to Knipe, is not a compliance with the order of Court, is refused.

(Exception noted for plaintiff.)

By Mr. NEWLIN:

Q. You can take up now all the allowances to the Berwind-White Company as they come in order. Go on to the next
409 one, and we will make the same exhibition of facts, because it can then be used afterward as evidence.

A. Book A 53, page 144. The same form of the Railroad Company is used, dated October 19th, 1898. Enclosed herewith are papers relating to claim made by the Berwind-White Coal Mining Company for terminal expenses on shipments of bituminous coal from the Clearfield region to various points during September, 1898, based on the following rates per 2240 pounds: To Philadelphia, Germantown Junction, Midvale, Frankford, Thurlow Chester and South Chester, \$1.00. Quinton, Bridgeton, Woodbury, Vineland, Collingswood, Millville, Salem, Elmer, Swedesboro, Clinton, \$1.20. Reading, Pottstown, Lancaster, ninety cents. Niagara, \$1.10. Clifton, \$1.20. Holmesburg, \$1.20. Robesonia, \$1.00. Middletown, Pa., 77 cents. Hamburg, \$1.00. Wernersville, \$1.00. Sellersburg, \$1.55. Perkiomen Junction, \$1.00. Gibraltar, \$1.00. Vineyard, 85 cents. Downingtown, \$1.00. Lewisburg, 80 cents. Camden, N. J., \$1.00. Harrison, N. J., \$1.30. Passaic, N. J., \$1.55. South Camden, N. J., \$1.00. Jersey City, N. J., \$1.30. Asbury Park, N. J., \$1.50. Phillipsburg, \$1.30. New Durham, \$1.55. Lambertville, \$1.50. South Easton, \$1.30. Bordentown, \$1.35. Orange, N. J., \$1.55. Trenton, \$1.30. Heightstown, \$1.50. Red Bank, \$1.50. Medford, \$1.30. Long Island City, \$1.10. Lewes, Del., \$2.00. Kungles, \$1.30. Altoona, 80 cents. Pine, Pa., 80 cents. Milton, 80 cents. Notes. Stars referring to certain parts. Above marked prepaid. Other points another mark indicating

by way of Pennsylvania Railroad, Philadelphia and Reading Railway. Another note with a star, except shipments to Trenton Iron Company or New Jersey Steel and Iron Company. Please have a draft prepared for the amount payable as per your records, and send same to me at your earliest convenience. Yours truly J. G. Searles, Coal Freight Agent. Claim No. 15726. In the dollar column \$10,272.74. Add \$307.72, making a total of \$10,580.46.

410 Q. Does any additional paper accompany that?

A. Accompanying it is an impression press copy marked No. 15726, which agrees with the number of the claim just read. Berwind-White Coal Mining Company, Claim No. 2, \$10,943.92. Deduct sheet No. 5 which is included in check for \$64,400.72, \$671.18, leaving balance of \$10,272.74, to which is added Berwind-White Company's bill of \$307.72, making a total of \$10,580.46. On the same page press copy, dated November 5th, — 8, Berwind-White Coal Mining Company, Philadelphia. Gentlemen: \$10,609.55. J. G. Searles, per S. Claim 15726.

Q. What is that last, a receipt?

A. It is in connection with the claim for \$10,580.

By the COURT:

Q. What is the date of that?

A. November 5th, 1898.

By Mr. NEWLIN:

Q. What is the date of the letter of transmittal?

A. October 19th, 1898.

Q. This comes on the next page to the press copy you read?

A. Yes, sir.

Q. It is for the same claim?

A. Apparently.

Mr. NEWLIN: I ask for the same ruling on this letter for the same reasons.

The COURT: I so rule.

(Exception noted for plaintiff.)

By Mr. NEWLIN:

Q. Now take the next letter transmitting a claim of the Berwind-White Company.

A. Page 146, same book, on the same railroad form, dated October 20th, 1898. Enclosed herewith are papers relating to claim made by the Berwind-White Coal Mining Company for terminal expenses on shipments of coal from Clearfield region and Harmony to various points during September, 1898, based on rates per 2240 pounds, as follows: On Clearfield coal to Harsimus for re-shipment, 95 cents. To Greenwich for outside capes and for steamships, 55 cents. To Greenwich Point, inside capes, 75 cents. To Norwood, New York, on coal for Central Vermont Railroad, \$1.65. Canastota, New York, consigned to Rotterdam Junction, 92 cents. P. R. R., 47 cents. Lehigh Valley, 45 cents. From Harmony to

Harsimus, New Jersey, 95 cents. Greenwich, 55 cents for mixing with Clearfield coal for use of steamships. From Harmony to Harsimus for Consolidated Gas Company of New York, \$1.20. From Harmony to Perth-Amboy, \$1.30. From Harmony to Greenwich for outside capes, 80 cents. Please have draft prepared for amount payable as per your records, and send same to me at your earliest convenience. Yours truly, J. G. Searles, Coal Freight Agent. Claim No. 15727. Total amount \$45,319.43. On the following page, November 1st, 1898, Berwind-White Coal Mining Company, Philadelphia. Gentlemen: \$64,440.72. J. G. Searles, per S.

The COURT: They will all be under the same ruling.

The WITNESS: Page 234, same book, same railroad form. November 4th, 1898. Enclosed herewith are papers relating to claim made by Berwind-White Coal Mining Company for terminal expenses on shipments of bituminous coal from Dunlow and Harmony to various points during July and August, 1898, based on rates for 2240 pounds, as follows: In July and August, Dunlow to Lewes, Delaware, \$2. In July and August, Harmony to Harsimus for mixing with Clearfield coal for steamships, 95 cents. Harmony to Harsimus, consigned to Tottenville 4-1, 30 cents. To Greenwich for West Indies, 80 cents. To Greenwich for mixing with Clearfield coal for steamships, 55 cents. Please have draft prepared for amount payable as per your records, and send same to me at your earliest convenience. Yours truly, J. G. Searles, Coal Freight Agent. Claim 15765. On the following page 235, November 11th. 8. Berwind-White Coal Mining Company, Philadelphia. Gentlemen: \$5,996.29. J. G. Searles, per S.

Page 417, same book, same railroad form used. November 23rd, 1898. Claim made by Berwind-White Coal Mining Company for terminal expenses on shipments of coal during October, 1898, from Clearfield and Harmony to various points, based on rate for 2240 pounds, as follows: Clearfield to Harsimus for reshipment, 95 cents. Greenwich for outside capes and steamships, 55 cents; inside capes, 75 cents. Willington, New York, consigned to T. A. Gillespie & Co., 80 cents. To Norwood, New York, for Central Vermont Railroad, \$1.65. Canastota, New York, consigned to Rotterdam Junction, 92 cents. P. R. R., 47 cents. L. V. R. R., 45 cents. From Harmony to Pottstown, Pa., \$1.15. Canastota, New York, \$1.35. Watkins, New York, \$1.65. Binghamton, New York, \$1.60. Auburn, New York, \$1.75. Union Springs, New York \$1.85. Greenwich for West Indies and Portsmouth, New Hampshire, 80 cents, and for mixing with Clearfield coal for steamships, 55 cents. For Harsimus for New York, harbor, 95 cents. For Tottenville and Perth Amboy, \$1.30, and for the Consolidated Gas Company, \$1.20. Please have draft prepared for amount payable as per your records, and send same to me at your earliest convenience. Yours truly, J. G. Searles, Coal Freight Agent. Star mark. Via P. R. R. from Harrisburg and P. and R. on shipments from Harmony to L. V. R. R. which will be on regular basis. Claim No. 15850. Amount of claim \$50,191.70.

Q. Is there any memorandum accompanying that?

A. There is a memorandum on the next page, 418, a press copy memorandum. B. W. Claim No. 28, \$29,525.70. No. 29, \$2,146.80. Claim 30, \$2,361.65. Claim 32, \$6,823.40. Claim 413 33, \$1,883.70. Claim 34, \$471.90. Claim 35, \$5,006.44. Claim 36, \$162. Claim 37, sheets six, eleven, sixteen and seventeen, \$953.48, \$303.65, \$52.65 and \$15.49. Claim 38, sheet No. 12, \$484.84. Total, \$50,191.70. No. 15850.

Q. What is the next one in that same book?

A. Here are the claims for the month of October, 1898, page 420. Claim made by the Berwind-White Coal Mining Company for terminal expenses on shipments of bituminous coal from the Clearfield region to various points during October, 1898, based on the following rates for 2240 pounds: To Philadelphia, Tacony, Bridesburg, Germantown Junction and Chester, \$1.00. Engleside, Thurlow, South Chester and Wilmington, 1.00. Perkiomen Junction, \$1.00. Himrods, Jersey City and Trenton, \$1.30. Bridgeton, Vineland, Quinton, Woodbury and Salem, \$1.20. Millville and Swedesboro, \$1.20. Reading and Lancaster, \$90. Milton, Watsontown, Williamsport, Lock Haven and Pine, 80 cents. Middletown, 77 cents. McVeytown, 88 cents. South Easton, \$1.30. A name I cannot read, \$1.00. Bala, \$1.10. Easton, \$1.30. Bristol, \$1.10. Dauphin, 90 cents. Vin-yard, 85 cents. Clifton, \$1.20. Niagara, \$1.10. Lenni, \$1.30. Lewes, Delaware, \$2. Holmesburg, \$1.20. Gibraltar, \$1.00. Downingtown, \$1.00. Allentown, \$1.20. Leesburg, N. J., \$1.55. Passaic, \$1.55. New Durham, \$1.55. East and West Moorestown, \$1.50. Lambertville, \$1.50. Medford, \$1.30. Camden, N. J., \$1.00. Orange, \$1.55. Heightstown, \$1.50. Phillipsburg, N. J., \$1.30. Red Bank, \$1.50. Pleasantville, \$1.50. Bordentown, N. J., \$1.35. Long Island City, \$1.10. Jersey City for L. V. Railroad supply, 95 cents. Star mark. Via P. R. R. or P. and R. Railway prepaid, charge L. V. Railway with it—I cannot read the word. Star mark. Except shipments to Trenton Iron Company or New Jersey Steel and Iron Company. Please have draft prepared for amount payable as per your records, and send to me at your earliest convenience. Yours truly, J. G. Searles, Coal Freight Agent. Claim No 15851
414 Amount \$14,200.27. On the following page, 421, December 6th, 8. Berwind-White C. M. Co., Philadelphia. Gentlemen: \$14,201.08. J. G. Searles, per S.

Page 422, same book, same form. November 23rd, 1898. Claim made by Berwind-White C. M. Company for terminal expenses on shipments of bituminous coal from Clearfield region to various points during October, 1898, based on the following rates per 2240 pounds: To Naugatuck, Conn., \$2.30. Georgetown, Conn., \$2.05. Lee, Mass., \$2.05. Pittsville, Mass., \$2.05. Waterbury, Conn., \$2.30. Great Barrington, \$2.05. Mount Vernon, New York, \$1.80. Bethel, Conn., \$2.05. Danbury, Conn., \$2.05. Housatonic, Mass., \$2.05. Torrington, Conn., \$2.50. Mamoronack, New York, \$2.00. Please have draft prepared for amount payable as per your records, and send same to me at your earliest convenience. Signed, J. G. Searles. Claim 15852. \$1,952.49. On the following page, 421, Dec. 2nd, 1898. Berwind-White Coal Mining Company, Philadel-

phia. Gentlemen: \$52,128.07. J. G. Searles, per S. On the bottom corner, 15850—15852.

On the following page, same date, same form. Claim made by the Berwind-White Coal Mining Company for terminal expenses on shipments of bituminous coal from the Clearfield region to various points during October, 1898, based on the following rates per 2240 pounds: Jersey City, \$1.30. Mechanicsville, East Albany, Fonda, Schenectady, St. John's Valley, Watkins, Penyan, Auburn, Little Falls, Oneida, Syracuse, Canandaigua, Skaneateles Junction, Newark, \$1.35. Buffalo, New York, \$1.60. Black Rock, New York, \$1.60. Canton, Pa., \$1.00. Some point I cannot read, \$1.00. Himrods, New York, destined to East Albany on account of B. & A. Railway supply, 25 cents. Sodus Point, New York, F. O. B. \$1.05. Olean, New York, 80 cents. Elmira, New York, 95 cents. Port Jervis, New York, \$1.85. Niagara Falls, New York, \$1.71. Port Chester, New York, \$1.80. 38th Street, New York City, \$1.10. Bedford, New York, \$2.75. Brinckerhoffville, New York, \$2.35. Newfield, New York, \$1.55. Please have a draft prepared for amount payable as per your records and send same to me at your earliest convenience. Signed, J. G. Searles. Claim No. 15,853. \$1.60 added to \$19,450.28. Total \$19,471.98.

Following page, 425. December 10th, 1898. Berwind-White Coal Mining Company, Philadelphia. Gentlemen: \$19,471.59. J. G. Searles, S. Berwind-White Coal Mining Company, H. A. Berwind, secretary. 15,853.

Books 54 and 55 of this package, I did not work out the details, except my examination showed claims presented by the Berwind-White Company, in the other volumes of the package. Then I took up the first book in the next package marked "H." I omitted in the last few books to take all details. I found claims made by sundry companies which I have noted in the next two volumes.

Q. I want you to go on with Berwind-White until you get through with Berwind-White.

A. Package H.

Adjourned until May 12th, 1908, at 10 a. m.

(Trial Resumed May 12th, 1908, at 10.00 a. m.)

Mr. NEWLIN: Before going on with Mr. Wilson I desire to call attention to a mistake that was made yesterday in producing a certain answer which was filed in April, 1906, to a rule to produce as if it were the answer to the rule to produce under which the order was made upon which we are proceeding. The order of April 2, 1907, was made under a rule to produce of February 13, 1907. That answer did not contain any denial of the possession of any papers, or even say they were not preserved.

The COURT: I understand that is true. This is an answer to a formal rule.

416 Mr. NEWLIN: This is an answer to a formal rule.

The COURT: But, Mr. Newlin, we are going to try this case on its merits and we are going to have the papers here that you want.

if they have them, and we are going to give them a chance to have them here, disregarding the technical condition of the record; but what we want to get at is the merits of the case.

Mr. NEWLIN: That is what we want to get at precisely, and I will do that by getting things which show thus and so, and no more.

J. CHESTER WILSON recalled.

Direct examination continued.

By Mr. NEWLIN:

Q. Have you made a calculation in South Amboy shipments as set forth in Schedule A to show as of the item beginning April 1st, 1898, and ending April 1st, 1899? How much of those shipments were made after July 29, 1898?

A. After July 29, 1898, to South Amboy, until April 1st, 1899, 24,197 tons.

Q. That is out of the total of 24,430 tons?

A. Yes, as stated, from April 1st.

Q. Mr. Wilson, as to what are called the line shipments, which occur from the lower part of page 22, Schedule A, of the printed record to the end of the schedule; how much of those line shipments in gross tonnage was after July 29th, 1898?

A. 8870 tons to the line points after July 29th, 1898, and until April 1st, 1899.

Q. How much afterwards was on line points in addition to the 8000 tons you have just read; giving the total, including the 8000, what was the total of line shipments on Schedule A after July 29th, 1898?

A. 21,309 tons, gross tons.

417 Q. And that is all line shipments in Schedule A after July 29th, 1898?

A. Yes, sir.

Q. Now you can take up the letter-book you were at, the Joyce letter-book, and go on to the next letters of Berwind-White and Company.

Mr. NEWLIN: I ask leave to put in a supplemental brief in answer to the one by Mr. Gowen.

Q. The last page that you worked on was A-53, page 425; that was the last one that you produced. Now, get the next one after page 425 in that same book.

A. We completed that volume.

Q. Now, as to book 54, as to which you said you had not worked out the details; can you turn to that book 54 now, and following it from page to page, take the first allowance to Berwind-White & Company. This is book 54?

A. Book 54.

Q. Is there any allowance to Berwind-White and Company?

A. Yes.

Q. Turn to page 37; read what is there, the letter that is there; just call it "Searles' letter."

A. Transmittal letter of Searles to Knipe, relating to claim made by Berwind-White Coal Company.

Q. Just read it as it stands; just read the whole of it as it is.

A. "Enclosed herewith are papers relating to claim of Berwind-White Coal Mining Company for terminal expenses on shipments of bituminous coal from Herminie to Ludlowville, N. Y., Rushville, N. Y., and Seneca Falls, N. Y., during October, 1898, at 15 cents, 2240 pounds. On Shipments by way of Elmira to L. V. R. R., E. C. & N., charge L. V. R. R. on regular basis. Please have a draft prepared for the amount payable as per your records and send same at your earliest convenience. Claim No. 15905. D. W. 40. \$12.07."

Q. The claim was not transmitted with this letter, it was
418 not produced; that is, mentioned in this letter of transmittal?

A. No, sir.

Q. Now, what is the next?

A. The next page after a remittance of that amount of \$12.07 to Berwind-White & Company——

Q. What page is it?

A. Page 38.

Q. Go on with the next allowance.

A. On page 93, the same form, Pennsylvania Railroad, dated December 12, 1898, Searles to Knipe; "Enclosed herewith are papers relating to claim made by Berwind-White Coal Mining Company for terminal expenses on shipments of coal from mines to various points during November, 1898, based on rate of 2240 pounds, as follows: From Clearfield region to Harsimus, for re-shipment, 95 cents; to Jersey City, \$1.30; to Greenwich, for outside the Capes, \$.55; to Greenwich, for inside Capes, \$.75; and from Herminie to Harsimus for Consolidated Gas Company, \$1.20; to Greenwich for West Indies, Portsmouth and Boston, \$.80. From Herminie, for mixing with Clearfield coal, to Harsimus, \$.95, and to Greenwich for outside Capes and steamships, \$.55. Please have draft prepared for the amount, payable as per your records, and send same to me at your earliest convenience. Signed, J. G. Searles.' Claim No. 15929. \$48,061.22."

Q. Is there any statement accompanying that in the next page of the letter-book? If so, read it.

A. Statement giving numbers, page 94: B. W. C. M. Company, Claims No. 41, \$29,119.80; No. 42, \$1,592.40; No. 43, \$1,726.40; No. 44, \$10.80; No. 45, \$8,867.80; No. 46, \$1,849.40; No. 47, \$637.20; No. 48, \$4,018.92; No. 49, \$238.50; total, \$48,061.22. On the same page, press copy, December 17, 1898, Berwind-White Coal Mining Company, Philadelphia. Gentlemen: \$48,061.22.

J. G. Searles, per S. Claim No. 15929.

419 Q. Mr. Wilson, referring to the letter of December 12, 1898, that you have just read, were the accompanying papers, the enclosed papers relating to the claim, were they produced?

A. No, sir.

Q. Is there anything on the face of the letter which you have

just read, or the accompanying memorandum, or anything else that was produced, which would show what the terminal expenses were for which the allowances were made?

A. No, sir.

Q. Now, did you have any shipments from Clearfield region to Harsimus?

A. No, sir.

Q. Did the railroad company at that time take any shipments to Harsimus for any one except the Berwind-White Coal Mining Company?

A. No, sir; that I know of.

Q. Well, you were never able to get shipments sent to Harsimus pier?

A. No, sir.

Q. And you knew you could not get it from the course of business?

A. Yes, sir.

Q. Greenwich, for outside of capes; was that Pennsylvania State shipment or was it Interstate shipment, if it is for outside the cape?

A. It was ruled in the trial of the—

Q. Never mind what it was ruled.

A. I understood it to be State shipments.

Q. What do the words "outside the capes" mean?

A. "Outside the capes" means to go to the ocean, not to be delivered this side of Cape May.

Q. Then the point of delivery under that discrimination of "outside the capes" would be beyond the State of Pennsylvania?

A. Yes.

Q. Now, were you shipping to any of those points at this same period of time; the identical points?

A. Not within that month.

420 Q. Were these points within places which were in business competition with your delivery points, or any of them, at that period?

A. Yes.

Q. Now, which of these shipments mentioned here were in competition with other not identical, but for business purposes practically of same origin and competitive?

A. For delivery in New York harbor.

Q. Then all the Harsimus shipments were in competition with the ultimate point of reaching the consumer; they were in competition with your shipments?

A. Yes.

Q. How about Greenwich for outside the capes, was that the same?

A. That is the same.

Q. And from Herminie to Harsimus for Consolidated Gas Company; that shipment was also in competition with your business of reaching a purchaser if you could get to Harsimus pier?

A. Yes.

Q. Now, let me ask you this. Turn to Schedule A, and having

in view points in Schedule A of that period, that are here stated by you to be in competition with yours; state what were the charges that the International Coal Mining Company paid for the same points, or their equivalent, being in competition with your shipments?

A. \$1.20 to South Amboy.

Q. You paid \$1.20 to South Amboy as against \$.95 to Harsimus Pier for Berwind-White & Company?

A. Yes.

Q. What were the relative positions for reaching the customer between South Amboy and Harsimus Pier?

A. Harsimus Pier was two days' boating nearer New York harbor delivery.

Q. Than South Amboy?

421 A. Than South Amboy, and eighteen to twenty-two cents cheaper than by way of boats in South Amboy piers.

By the Court:

Q. Cheaper to get to the consumer?

A. Yes, sir.

Mr. NEWLIN: Cheaper to get to the consumer by Harsimus pier.

The Court: By twenty-two cents?

Mr. NEWLIN: By twenty-two cents.

By Mr. NEWLIN:

Q. Now, take Jersey City, \$1.30. Compare that in this letter of transmittal with what was paid by the International Coal Mining Company.

A. We had no shipments to Jersey City in that period.

Q. Had you any point in competition with Jersey City at that period?

A. I think not.

Q. Now, go on to Greenwich for outside the capes. Had you any shipments in that period?

Mr. GOWEN: I do not wish to interfere, but we are taking so much time with them; it seems a waste of time to go into the State shipments.

Mr. NEWLIN: It is very important. I have no doubt Mr. Gowen has a schedule of all these things himself, which he could furnish to the Court and opposite counsel.

Mr. GOWEN: We have no such statement.

The Court: The objection raised, as I understand, is that you are taking up State shipments.

Mr. NEWLIN: No, they are not State shipments. These are Interstate shipments. Harsimus pier is in the harbor of New York.

Mr. GOWEN: It was the Greenwich shipments I was referring to.

422 Mr. NEWLIN: As to the Greenwich shipments for outside the capes, this witness has stated the condition of things which made them Interstate shipments, because they were to be

carried beyond Pennsylvania, and we have a right, therefore, to ask as to that.

The COURT: Where is Greenwich?

Mr. NEWLIN: It is down here at League Island. It is shipped to that point to go from there to points beyond the State.

The COURT: But if that is the end of the shipment as to your competitors—

By Mr. NEWLIN:

Q. As to this class I am simply asking if those shipments were in competition with shipments they were making at the same period because the railroad company issues a bill of lading all the way through; it issues to points beyond; it did not simply manifest it to Greenwich but to points outside the capes, so that it makes it one transaction with the railroad company to a point beyond Pennsylvania?

A. I see one cargo sent to Greenwich, consigned to Boston by the schooner Withington, 852 tons, in December, 1898.

Q. How much did you pay on that? Was it the same or more or less?

A. It is the same rate, \$.55, in the claim. I do not know whether the claim was paid in full or not. In the same month, November, 1898, there were three ships; one went to Mexico by our Company.

Q. Outside the capes that was?

A. Yes, by way of Greenwich piers, and the rate in the claim is \$.55?

Q. You mean the claim that you put in for an allowance on that, rebate on that, from \$.55?

A. Tariff rate, \$.75; the rebate asked was \$.20.

Q. You mean that you claimed \$.20. Then this \$.55, 423 as stated in December 12, 1898, letter of the allowance of the rate fixed for Berwind-White and Company was \$.20 lower than the open rate?

A. Than the tariff rate.

Q. The tariff rate was then \$.75?

A. Yes.

Q. And you paid the tariff rate?

A. Yes.

By Mr. GOWEN:

Q. Now, Mr. Wilson, with that there the net rate, you paid the tariff rate and that was the net rate you paid?

A. We paid \$.75.

Q. That was the net rate with no adjustment?

A. Without adjustment.

Q. What month?

A. November, 1898.

By Mr. NEWLIN:

Q. Now, to Greenwich for steamships.

A. There were three ships coaled that month, 193 tons in all.

Q. What were you charged?

A. The tariff rate, \$.90, and we asked in the claim for an allowance of \$.35, reducing it to \$.55.

Q. Now, take this item from Herminie to Harsimus, for the Consolidated Gas Company, \$1.20. Do you know what was the tariff rate between those two points?

A. No, sir; I have no knowledge of that business.

Q. Is there anything on the face of this letter to show you how much of a reduction from the tariff rate, \$1.20, was, as specified there to Harsimus?

A. No.

Q. But you were not able at that time, or any time to reach Harsimus pier?

A. No, sir.

Q. Is there anything on the face of this letter in the
424 reference to rates per ton to show that the settlement mentioned here was made on the basis of the rates mentioned?

A. No.

Q. So that from the face of this letter you cannot tell whether the rates charged were those rates, or whether those were the tariff rates, or whether those were the reduced rates; nothing in the letter to show that?

A. No, sir.

Q. Is the tonnage given?

A. No, sir.

Q. So that you could not arrive at the rate per ton by dividing the number of tons into the amount of money?

A. No, sir.

Q. Now go to the next, Berwind-White and Company.

Mr. NEWLIN: This is a case where a great many shipments are State shipments, and, of course, irrelevant, but it is a part of the letter, and I suppose you will have to read the whole letter.

The COURT: Not unless the other side wants it read.

Mr. NEWLIN: I do not want to read it. We will have to undertake ourselves to drop out what are State shipments. I will do that with this letter and cut it down unless the other side objects.

The COURT: Cut out State shipments unless it is objected to.

Q. Read that letter just as it stands, putting in all the other shipments, but leave out State shipments.

A. Page 183, letter dated December 19, 1898. "Enclosed here with are papers relating to claim made by Berwind-White Coal Mining Company for terminal expenses on shipments of bituminous coal (one word I cannot read) from the Clearfield region to
425 various points during November, 1898, based on the following rates for 2240 pounds: To Wilmington, \$1.00; Bridgeton, Vineland, Quinton, Elmer, Woodbury, Salem, Millville and Woodboro, N. J., \$1.20; Orange, E. R. R., \$1.55; Bordentown, N. J., \$1.35; New Durham, N. J., \$1.55; Harrison, Jersey City, E. R. R., Trenton, except for shipments for Trenton Iron Company and New Jersey Steel and Iron Company, and Medford, N. J., \$1.30; Red

Bank, Hightstown, East and West Moorestown and Stanwick, N. J., \$1.50; Lewes, Del., \$2.00; Conowingo, Md., \$1.30; by way of E. R. R. and P. & R. R. R. Please have a draft prepared for that amount, payable as per your record, and have sent to me at your earliest convenience. Signed, J. G. Searles, Coal Freight Agent. B. W. C. Co., No. 45, claim No. 15970. Amount \$14,959.36.

Q. Is there anything accompanying that?

A. No, sir.

Q. Is there anything to show on the face of this letter what were the terminal expenses?

A. No, sir.

Q. Anything to show whether the rates mentioned here are the net rates charged to Berwind-White and Company, or whether they are the tariff rates or not?

A. No, sir.

Q. Is there any tonnage given so that you could divide the tonnage into the amount of allowance and ascertain how much per ton was allowed?

A. No, sir.

Q. Were any of these shipping points mentioned the same as the International's, in Schedule A?

A. I do not find that in that month in particular we shipped to the same points.

Q. That is to say the identical points. Did you ship during that month to any points that were in business competition for trade with the points named in this letter?

A. I think not.

Q. Now, go the next.

426 A. Page 185, letter dated December 19, 1898. "Enclosed herewith are papers relating to claim of Berwind-White Coal Company for terminal expenses on shipments of bituminous coal from Clearfield region to various points during November, 1898, based on the following rates per 2240 pounds: To Fonda, East Albany, Schenectady, Amsterdam, Troy, Mechanicsville, West Albany, Oneonta, Honeoye Falls, Auburn, Syracuse, Canandaigua, Newark Valley, Utica, Herkimer, Moravia, Little Falls, Binghamton, Penn Yan and Watkins, N. Y., \$1.35; Buffalo and Black Rock, N. Y., \$1.60; Himrods, N. Y., on account of the B. & A. R. R. supply, \$.25; Elmira, N. Y., \$.95; Rotterdam Junction, N. Y., \$1.35; Olean, N. Y., \$.80; 38th Street, New York City, \$1.10; Long Island City, \$1.10; Bronxville, \$2.35; Jersey City on account of the L. V. R. R. supply, \$.95; Pittsfield, \$2.05; Waterbury, Conn., \$2.30; Danbury, Conn., \$2.05; Mangatuck, Conn., \$2.30; Lee, Mass., \$2.05; Watertown, Conn., \$2.50; New Hartford, \$2.55; Housatonic, \$2.05; Mt. Vernon, N. Y., \$1.80. Please have a draft prepared for the amount payable as per your record and send same to me at your earliest convenience. Signed, J. G. Searles, Coal Freight Agent. Claim No. 15971." Three items of money at the bottom corner of the letter, added, make a total of \$20,409.79.

Q. Were there any papers in connection with that accompanying it?

A. No, sir.

Q. Now, referring to this letter just read, is there anything on the face of it to show what terminal expenses amount?

A. No, sir.

Q. Nor whether the rate mentioned is a tariff rate or a reduced rate?

A. No, sir.

Q. Nor the tonnage is not given?

A. The tonnage is not given.

427 Q. Were any of those points, the actual and same identical points, in competition with shipments by the plaintiff?

A. Yes, in a few cases.

Q. What were they? What places?

A. West Albany, Lee, Mass.; Pittsfield, Mass.; Long Island City, N. Y. I believe that is all.

Q. Now, if those rates given in Searles' letter are net rates to Berwind-White and Company, just compare them with the rate the plaintiff paid on the shipments in the same period to the same places.

A. Albany, Berwind-White rate, \$1.35.

Q. What did you pay?

A. \$1.80.

Q. As against how much charged to Berwind-White?

A. \$1.35.

Q. That made a difference between the same points at the same time between Berwind-White and Company and the International of \$.45 a ton. Is that so?

A. That is the difference between the tariff rate and the rate—

Q. Specified in the letter?

A. Specified in the letter.

Q. Now take another point.

A. Long Island City.

Q. What did you pay?

A. The tariff rate, \$1.85.

Q. What was charged under this adjustment to Berwind-White and Company?

A. \$1.10.

Q. That made a difference of how much against you?

A. \$.75.

Q. Now, take the next point. What you are reading covers the same dates as in this letter?

A. The same month exactly, same points exactly. Page 203.

Q. Are those all that you got the same period?

428 A. Yes.

Q. Now, in the same period of November, 1898, were you shipping to any other points not exactly identical but competitive by nearness to consumers?

A. Not particularly in competition.

Q. Well, go on with the next.

A. Page 203, December 21, 1898, Book A-54.

Q. I forgot to ask you whether the claim papers were in the last

letter of transmittal when it came here for examination; did the claim papers come with it?

A. No, sir.

Q. Now, go on with that.

A. "Enclosed herewith are papers relating to claim of Berwind-White Coal Company for terminal expenses on shipments of bituminous coal from Clearfield region to various points during November 1898, based on rates for 2240 pounds, as follows: To Canestota, N. Y., Easton to Rotterdam Junction, including August shipments, \$.92; to Wallington, N. Y., consigned to T. A. Gillespi & Company, Massina Springs, \$.80; also shipments from Herminie to Buffalo, N. Y., \$.80, and to Sodus Point, N. Y., \$1.50. Please have a draft prepared for the amount, payable as per your records, and send same to me at your earliest convenience. Signed, J. G. Searles, Coal Freight Agent. Claim No. 15979."

Q. Any accompanying paper with that?

A. No monies stated.

Q. There is nothing on the face of that to show what terminal expenses mean?

A. No, sir.

Q. Nor what the rate fixed is, whether it is a net rate or not, nor the tonnage?

A. No, sir.

Q. Were you in competition with any of those points, exactly, identical points, or any practical competition by reason of the business of consumers?

A. Not during that particular month.

429 Q. Now, the claim that you just examined, the letter of transmittal, dated December 21, 1898; there is no amount given at the bottom of the letter of transmittal. Is there any accompanying paper showing how much was allowed?

A. \$1,447.36.

Q. On what page is that stated?

A. Page 204, the following page.

Q. Now go to the next.

A. Book A-54, page 354, letter dated January 10, 1899. "Enclosed herewith are papers relating to claim made by Berwind-White Coal Mining Company for terminal expenses on shipments of bituminous coal from Clearfield region to various points during December, 1898, based on the following rates, per 2240 pounds: To Harsimus, N. Y., for each shipment, \$.95. To Greenwich, for outside capes, \$.55, and for steamships, \$.55. To Greenwich for points inside Delaware capes, \$.75, and on shipments from Herminie to Harsimus for reshipment to mix with Clearfield coal, \$.95. To Harsimus, consigned to Perth Amboy, N. J., \$1.30. To Harsimus, consigned to Consolidated Gas Company, N. Y., \$1.20. Greenwich, for outside capes, and for steamships, to mix with Clearfield coal, \$.55. To Greenwich, for West Indies, \$.80. Please have a draft prepared for the amount, payable as per records, and send same to me at your earliest convenience. Signed, J. G. Searles, Coal Freight Agent. Claim No. 16057. Amount of money, \$54,091.88."

Q. Is there any accompanying paper?

A. A memorandum appears copied on the same page giving the numbers in detail of seven claims making up this amount of money, \$54,091.88.

Q. Were any of those claim papers that were transmitted with this letter produced?

A. No, sir.

Q. Is there anything on the face of the letter to show what terminal expense amount?

430 A. No.

Q. Or what the tonnage was?

A. No.

Q. Or whether the rate fixed was a reduced net rate to Berwind-White and Company, or whether it was a tariff rate?

A. No.

Q. Were you shipping in competition with any of those points at the same time?

A. To Greenwich?

Q. Yes; to Greenwich, for outside the capes.

A. Shipments from Greenwich piers, Philadelphia, consigned to points outside the capes.

Q. How much did you pay at that time?

A. \$.75, tariff rate, and claimed \$.20.

Q. As far as you know, did you get it or not?

A. I do not know just now whether we got it all or not.

Q. These shipments to Harsimus, N. Y., for reshipment, \$.95, in this letter of January 10, 1899; was that in competition with your shipments at the same time by way of South Amboy?

A. During the month we loaded six boats at South Amboy.

Q. But those were points in competition as to reaching the final consumer of the coal?

A. Yes.

Q. Now what did you pay when this was fixed at \$.95 by way of Harsimus pier; what did you pay by way of South Amboy, to the railroad, and what did you afterwards have to pay to get it from the railroad beyond to a point as near to the consumer as Harsimus pier?

A. \$1.20, the rate to South Amboy. We asked to have the rate reduced to \$.90.

Q. Do you know whether you got it or not?

A. No.

431 By Mr. GOWEN:

Q. Do you mean by that you did not get it, or you do not know?

A. I do not know. The freight rate then from South Amboy to New York harbor was from eighteen to twenty-two cents a ton.

By Mr. NEWLIN:

Q. Harsimus pier is in New York harbor?

A. Yes.

Q. Now, for Greenwich, outside the capes, and for steamship coal?

A. During the month of December——

Q. What did you pay?

A. For steamships, \$.90 was the rate to Philadelphia for bunkering steamships. We claimed \$.30.

Q. Did you get it, or didn't you get it?

A. I do not know.

Q. Now, from Harsimus; does that mean from Harsimus consignment to Perth Amboy, or has Harsimus got anything to do with it?

A. Yes.

Q. Now, take the item under Harsimus consignment to Perth Amboy, \$1.30. Did you make any shipments to Perth Amboy at that time?

A. No, sir.

Q. Greenwich, for outside cape steamships, you have covered that in what you have said?

A. Yes, sir.

Q. In connection with this last letter read, what is on page 375 of the same book?

A. "January 19, 1899, Berwind-White Coal Company, Philadelphia. Gentlemen. \$53,226.68. J. G. Searles, per S. Claim No. 16057."

Q. That agrees with the claim number just mentioned?

A. The claim just read.

Q. The amounts differ; the claim is for \$54,091.88 and 432 the allowance appears to be \$53,226.68, but the number agrees with the letter preceding. The claim is reduced?

A. The same thing.

Q. In that transaction you have just read from the blanks. How do you account for them? What does it mean, or do you understand?

A. I would understand it was a form without being printed in copying ink, containing other words meaning a transmittal of that amount of money.

Q. But the printed part of the form has not been copied in the press-book?

A. No.

Q. Now, go on with the next.

A. Page 446, Book A-54. Letter dated January 17, 1899. "Enclosed herewith are papers, relating to claim of Berwind-White Coal Mining Company on shipments of bituminous coal from Clearfield region to various points during December, 1898; based on the following rates for 2240 pounds: To Syracuse, Canandaigua, Schenectady, Fonda, Troy, Mechanicsville, West Albany, Amsterdam, East Albany, Binghamton, Auburn and Penn Yan, N. Y., \$1.35; Black Rock and International Bridge, Salamanca, N. Y., \$1.60; Himrods, account B. & A. R. R. supply, \$1.35; East Albany, N. Y., Olean, N. Y., \$.80; Bronxville, N. Y., \$2.35; Suspension Bridge, \$1.71; 38th Street, New York City, \$1.10, account Burns Bros.; Long Island

City, \$1.10; Pittsfield, Housatonic, Lee, Mass., Canaan, Danbury, and Georgetown, Conn., \$2.05; Waterbury and Nangatuck, \$2.30; Harrison, N. J., \$2.00; Watertown, Conn., \$2.50; Thompsonville, \$2.55; Port Chester, N. Y., \$1.80; Mt. Vernon, N. Y., \$1.80. Please have a draft prepared for the amount, as per your records, and send same to me at your earliest convenience. Signed J. G. Searles,

Coal Freight Agent. Claim No. 16090. Two amounts of 433 money added together, making a total of \$17,979.36.

Q. Is there any accompanying paper with that?

A. No, sir.

Q. Now, there is nothing on the face of that letter showing what terminal expenses meant?

A. No.

Q. Nor what the tonnage was?

A. No.

Q. Nor whether the rate mentioned is a net rate to Berwind-White and Company or the tariff rate?

A. No.

Q. Nor to show that the money was actually paid to them?

A. No.

Q. Now, state whether you were shipping at the same time between any of the identical points; if not identical, were in competition for the same trade?

A. I gave our comparison in shipments in connection with the former answer for account of the same months.

Q. You will have to give it again.

A. West Albany and East Albany.

Q. What were you charged?

A. \$1.80 tariff rate.

Q. What was charged on this settlement, to Berwind-White and Company?

A. \$1.35.

Q. How much was that a discrimination or reduction as against yourselves, against the plaintiff?

A. The difference was \$.45.

By the COURT:

Q. That was during what period?

A. December, 1898.

By Mr. NEWLIN:

Q. We are beginning with the time that you allow, within the six years, by bringing it down month by month.

434 By the COURT:

Q. Did you receive any return during the time at all?

A. Yes, sir.

Q. To what extent?

A. Well, to very nearly, if not up to in some cases, the same figure as shown by this statement.

By Mr. NEWLIN:

Q. As you go along, state that.

A. I cannot state it exactly, because the allowances were not always followed on our claims.

By the COURT:

Q. When was it you began not to receive any allowances at all?

A. April 1, 1899.

Mr. NEWLIN: We got nothing after April 1, 1899, and in the interval these things came out, and sometimes we did get something and sometimes we did not, and I want him to state when he got any, to state it as we go along, otherwise we stand as the difference between what he paid and what they are allowed in the settlement.

The COURT: I do not want to interfere at all with your method of trying the case, but why is it not sufficient when you establish, for instance, no transportation to your competitors less than the schedule rates at a certain date, and then show you paid freight on so many tons? Why is not that all you want?

Mr. NEWLIN: That is all we want and that is all we are doing.

The COURT: Is it necessary to take so many of these?

Mr. NEWLIN: It is necessary because the shipments differ all the time and they would say it was not identical in date. We
435 have got to show identically the shipping point and terminal point and identically the date. We are obliged to do that.

Mr. GOWEN: If you could exercise sufficient control over the manner in which this case is conducted to require Mr. Wilson, when he finishes each month of the Berwind-White statement to turn to me statement for the same month of the plaintiff, the International Coal Mining Company, and let him then state what their adjustments were, you will find that there was an exact similarity all through these months on shipments to the same points in the rates charged. Mr. Wilson, you will observe, whenever Mr. Newlin asks him what rate he paid, he does not answer what rate he paid. He says the tariff rate was so and so.

Mr. NEWLIN: I want him to state what he paid.

Q. You paid the tariff rate and then you made a claim to get it back, is that it?

A. Yes; that is what is paid.

Q. Whenever it was paid; let that go and go on to the next. I want to get at the exact result when this was reduced to Berwind-White and Company to a certain amount; then you show what you paid, and if you got it back say so, and if you did not get it back say you did not, or you do not remember, or whatever it may be. Bring it all out so as to show the net result.

Mr. GOWEN: In every shipment he referred to thus far he stated he does not know, so we are starting in with this new arrangement.

Mr. NEWLIN: Yes.

Q. You were going to take a further case in the same letter where you were shipping in competition during that same month?

436 By the COURT:

Q. Mr. Wilson, do these letters that you are reading state a settlement for shipments to these points at the reduced rate to your competitor? Is that correct?

Mr. NEWLIN: That is what he thinks it is, but it does not say on the face of it that that is what it is.

A. I think so, yes.

By the COURT:

Q. Let me ask you again, Mr. Wilson, if that is the reduced rate at which your competitors shipped to those points, if you would take those letters and then compare that with what you paid to these points, and then look at the published tariff rate for that date, does not that establish just what your competitors got over you?

A. Your Honor, yes, so far as those papers are concerned, but there may be other allowances in addition to these that reduce the amount—its equivalent—by the payment to other people. That is a further examination, as I take it, while this part looks as though in most cases it was smaller up to April 1, 1899.

Q. Could you not make such a statement from these papers down to the time of your bringing suit, what the difference would be, and make your calculation on the number of tons you have shipped, that your competitors have gotten an advantage over you?

Mr. NEWLIN: Yes, that would be from July 29, 1898, within the period of time that you allow.

The COURT: Then couldn't you put in just down to what time you received returns and then when you did not receive any returns, because I think there is going to be a difference; at least, you ought to be able to separate them for the purpose of passing upon them properly. Could you not do that?

The WITNESS: Yes, sir.

437 Q. How long would it take you?

A. From these papers or any other additional papers you might have to have.

Mr. NEWLIN: We have not any additional papers. We have not got those claims.

The COURT: If you cannot go any farther, and you cannot find out, we will see if there is any more to be had.

Q. How long would it take you to do that?

A. Probably two days.

The COURT: It is suggested and agreed by the defendant's counsel that the defendant will pay for the cost of tabulating a statement showing the shipments by the plaintiff on the coal mentioned in its statement from the initial points to the destination therein mentioned in plaintiff's statement. Also a statement of what part of these shipments the plaintiff received a return of freight paid. Also for the cost of a statement of settlements of the plaintiff's competitors during that time from the same or similar points to the same or simi-

lar destinations, and giving the rates from the documents produced at which the railroad settled with the plaintiff's competitors for these shipments, and an additional statement showing the regular published tariff rates for shipments of coal between these points during this time.

Adjourned until Tuesday, May 19th, 1908, at 10 a. m.

PHILADELPHIA, *May 19th, 1908.*

At the request of counsel for plaintiff witnesses were called, and the following failed to respond: John P. Green, John B. Thayer, M. Riebenack, F. A. von Boyneburgh, W. J. Foss, N. E. 438 Tucker, Boyd L. Spahr, Ellis Ames Ballard, J. Brinton Roberts, Frank H. Wigton, A. J. Berwind and Samuel Meredith.

Counsel for plaintiff offers to read to the jury that portion of the record of this cause ending in a default judgment for want of a rebutter, finding that the railroad company was guilty of fraud in attempting to sell out this very suit by getting control of a small judgment against the International Coal Mining Company, and using the money in the railroad's hands belonging to the International Coal Mining Company to buy out this very suit with the International Coal Mining Company's own money, at a time that that money was attached in the hands of the railroad company by a garnishee process, for the purpose of paying the judgment.

The COURT: That offer has absolutely nothing to do with this case. It was adjusted in a proceeding prior to the trial of this matter. The offer is overruled.

(Exception noted for plaintiff.)

Mr. NEWLIN: I offer in evidence the Harsimus pier lease produced by the defendant.

(Lease marked "Exhibit 1, 5-19-08, W. M. C.")

Counsel for defendant admits that the notice set forth in the docket entries of this case, in the printed record, page 7, reading as follows: "April 15th, notice of the orders of March 25th, 1907, and April 2nd, 1907, of the rule to produce, etc., and that plaintiff will on the trial claim the penalty of judgment by default under R. S. 724 if orders are not complied with," was served upon the Railroad Company and upon counsel of record within a few days of that date, April 15th, 1907.

439 ROBERT M. RICKEY, sworn.

Mr. Newlin states that he calls this witness now for the purpose of explaining the work done under the order of the Court, and giving such explanation and having such examinations made as will elucidate what was before the auditor and what is reported on.

By Mr. NEWLIN:

Q. Have you a schedule of the books that were produced giving the letter and the number and the dates covered?

A. Yes, sir; I have.

Q. Have you it with you?

A. Yes, sir; right here.

Q. Does that give the numbers of all the books, with the letter, whatever it is, and the dates covered by the letters in that particular volume, giving each volume in the schedule shape?

A. It gives the first date in each package and the last date in each package. There may be several books in each package.

Q. You give the number and letter of each book in each package?

A. Yes, sir.

Mr. NEWLIN: I will ask that that may be marked in such a way that it will be part of the stenographer's notes, without actually being copied in.

(Paper produced by the witness marked "Exhibit 2, 5-19-08, W. M. C.")

Q. Have you a memoranda of the numbers and lettering of the lettered books that on the outside of the packages were stated to be there, in the railroad's notations, but which were not in those packages?

A. Yes, sir; that is shown on this same list.

Q. It is a fact, is it not, that after your appointment there
440 was added to the documentary evidence already in the hands of the clerk, the tariff sheets which were used within the periods?

A. Not of my own knowledge. The tariff sheets were in the room. We worked entirely from books which were in the room of the Clerk of this Court, and I do not know when those books came in there. I did not see them come in.

Q. But you did work, amongst other things, from certain volumes that they had there, that appeared to be tariff sheets, during this period in question?

A. Yes, sir.

Q. Have you made tabulations of the contents of the various books that you did examine?

A. I have.

Q. Do you recall about how many books there were all told, and how many of them you used, throwing out the rest, how many were found to be totally irrelevant?

A. In all there were about 23 books used.

Q. In all there were about how many in the production in answer to the call?

A. About 74, that is including both the books of the defendant and the plaintiff.

Q. Leaving out the plaintiff's how many of the railroad company's books on examination was it found had nothing to do with this inquiry, and were thrown out?

A. About 48.

Q. 48 were not used at all?

A. I am not counting packages. I am counting the contents of the packages. That is all represented in four or five packages.

Q. So that there were 48 books that were not used at all, that had been produced, and some of those were excluded on account of the period of time, that is to say, they were earlier than July 29th, 1898.

Do you recall about how many of those books within the period of time that you made the search, were found not to refer to this subject at all?

A. About 26.

441 Q. About 26 volumes antedated the date of the examination, and were excluded on that account?

A. Yes, sir.

Q. And the rest of those produced and not used were excluded because they had no reference to the subject matter?

A. Yes, sir.

Q. Will you explain in your own way how you proceeded from day to day in making up these tabulations, and the time it took, each day from such an hour to such an hour, and when you really got through and furnished us this morning with the report of the auditor?

A. We have made a report which is different for different periods, so that I will have to describe each one of them.

Q. What I want to show is on each day—for instance you started on Tuesday afternoon and you devoted a certain amount of time to it that day. On Wednesday you practically occupied from such an hour in the morning until such an hour in the afternoon, and so on each day, until Saturday night ran into Sunday morning at six o'clock. Then you took it up again on Monday, and only got through last night. I want to show the volume of work, the complications that required even experts to go through it in that way. How did you proceed from day to day? What time did it consume?

A. Tuesday we were only here for about an hour, from four to five, something like that.

Q. How about Wednesday?

A. Wednesday from nine o'clock until five.

Q. Thursday?

A. From nine to nine in the evening.

Q. Friday?

A. The same as Thursday.

Q. Saturday how long were you?

A. From nine in the morning until six o'clock Sunday morning.

442 Q. Then yesterday you were at work from what hour until what hour?

A. About nine to five.

Q. Then this final report comprehending tabulations is the paper you furnished me this morning a little while before ten o'clock?

A. That is an exact typewritten copy of the paper I furnished you yesterday through Mr. Robb.

Q. You mean the report accompanying the tabulations?

A. The tabulations are the report.

Q. It is all in one paper?

A. Yes, sir.

Q. In making the examinations, it is a fact, is it not, that all shipments between points in the State of Pennsylvania were omitted by consent of both sides?

A. Yes, sir.

Q. Is it not a fact that the totals of both the state shipments and the interstate shipments entered into the details of the allowances set forth in the letters of Mr. Searles to Mr. Knipe, without it being possible to distinguish how much of the money set forth as a proposed allowance went into interstate shipments or was on the basis of interstate shipments?

A. In those books in packages G and H there were letters which included points which were both interstate points and intra-state points, and there was no way in those books. There was just one amount shown for the whole claim.

Q. Then there was nothing on the face of Searles' letter in any case where State and interstate were both the subject of an allowance, from which you could tell how much was allowed for interstate shipments as distinguished from interstate shipments in money?

A. No, sir, there was not.

Q. It not appearing how much in money was allowed, you could not tell how much per ton was proposed to be repaid upon interstate shipments?

A. Yes, sir, we could. The letter stated that a certain amount per ton, or I infer it is per ton, would be applicable to each destination.

Q. Did the letter say so?

A. Yes, sir.

Q. You are drawing that inference, or did it say so in so many words?

A. What it did not say was "per ton." That is simply a unit that I took myself.

Q. But you had no unit of the Berwind-White Company, for instance, to show what their tonnage was, had you?

A. No.

Q. Therefore in dealing with a case like that of a lump allowance to the Berwind-White Company at a fixed period which included both interstate and State shipments, there was not on the face of the Searles letter an indication of the tonnage of the Berwind-White, or how much of the bulk allowance was for State and how much for interstate shipments?

A. There was not.

Q. You could not from the face of the Searles letter work out that result?

A. No.

Q. Is it not a fact that Harsimus Pier and South Amboy, in making this investigation, were treated as similar points of delivery?

A. Taking the instructions from both counsel, I have looked up Harsimus Pier, but I do not think it is a question for us to say whether or not they are similar points.

Q. I want to know whether in making these tabulations and contrasting between the plaintiff's and the Berwind-White's shipments, the plaintiff's shipments to South Amboy and the Berwind-White to

Harsimus and also to South Amboy, were all treated as if they were to one delivery point from Clearfield?

A. Not as though they were one delivery point. I have shown in our tabulations the shipments to Harsimus just the same
444 as I have to South Amboy, but I have designated it as Harsimus.

Q. So that you get the result stated both ways, that is to say, you have separated South Amboy and Harsimus Pier, the one being alone for the Berwind-White Company. There were no shipments by anybody else but the Berwind-White Company to Harsimus Pier?

A. None that I saw.

Q. Then in another designation or classification you put all South Amboy, whether by the Berwind and others and the International?

A. Yes, sir.

Q. What course have you pursued in your column relating to the difference between the plaintiff's shipments to South Amboy and the Berwind-White Company's to Harsimus? Have you treated that column as if it was indicating the difference between similar points?

A. I do not see just what you mean?

Q. Take, for instance, as a classification, the matter of overlapping contracts and unfilled contracts, or unexpired contracts, the whole of the class, and we will take deliveries on Harsimus Pier by the Berwind-White Company. In making the table showing how much less the Berwind-White Company were charged than the International Company was charged, did you contrast Harsimus Pier shipments by the Berwind-White Company with the shipments of the International Company to South Amboy, in arriving at that column?

A. In the period when there was a less rate it was not necessary to do that, because the Berwind-White Company had shipments to South Amboy which were at the same rate as Harsimus.

Q. Then you have not tabulated as between Harsimus Pier and South Amboy, and there has not entered into your tabulation the allowance made on unfilled contracts, overlapping contracts
445 and unexpired contracts, the allowances that were made to the Berwind-White Company on Harsimus Pier have not been contrasted with those of the plaintiff to South Amboy, but only the shipments of the Berwind-White Company and the plaintiff to South Amboy?

A. Yes, sir. There is a foot note on that tabulation which would give you that result by simply looking at it.

Q. Where is that in the bound tabulation? Could you refer to it by page?

A. It is on the page marked "Exhibit C" and also "Exhibit D" in this report of ours.

Q. Do you mean there is a note now on those pages that refers to the subject?

A. Yes, sir.

Q. In the Harsimus Pier shipments contrasted with the South

Amboy shipments of the Berwind-White Company during this overlapping contract period, how do the allowances of reductions to the Berwind-White Company compare? Were they the same for Harsimus Pier and for South Amboy?

A. You mean what is the difference between the rates?

Q. Yes. For instance, when a certain account came back as a reduction on the tariff, was the amount the same, 35 cents, whether for Harsimus Pier, or South Amboy, or was there a difference?

A. It was the same amount.

Q. So that it did not enter into the matter which way it is, it was the same, 35 cents?

A. In saying that I want to explain that we have taken in each instance the lowest rate. There might be rates between the lowest and the tariff rate.

Q. But in contrasting rates as allowed between the International and another shipper, you have taken for the comparison the lowest rate allowed to the other shipper, the competing shipper?

A. Yes, sir.

Q. In determining whether in a particular month the
446 shipments by the International and the other shippers inquired into, were simultaneous, that is to say, during the same months, and between the same places, have you used simply identical points of delivery and confined it to that, or have you grouped similar points as was stated in the order of the Court? For instance, there might be a shipment between Clearfield and A by the International Coal Mining Company and a shipment between Clearfield and B by the Berwind-White Company, and those two would be similar points, both in trade and geography on their face. Have you adhered to the identical names respectively of the delivery points, or have you taken in for comparison similar points as mentioned in the order of the Court? Have you treated certain places as similar points, like Harsimus and South Amboy, or have you done that in any other case except Harsimus?

A. As a rule we have taken the destinations shown in your statement or bill of particulars.

Q. Schedule A?

A. Yes, sir; and the only deviation from that is where there are some destinations shown in the books of the plaintiff which the plaintiff claimed went through certain junction points which were similar points, and in those cases we gave the plaintiff credit for those shipments at the junction point, instead of at the point where their books showed that the coal was destined.

Q. The entire mass of documentary evidence consisted of letters from Mr. Searles, the coal freight agent of the defendant, to Mr. Knipe, the auditor of freight receipts of the defendant. That was the whole matter that you examined?

A. I really cannot answer that question, because I did not examine those records as to their quality. I simply took the packages that were submitted. They are marked "G" and "H."

Q. When the book of press copy letters bound in a volume
447 was opened and you examined those different letters, they showed on their face that they were communications from

Mr. Searles, coal freight agent of the defendant, to Mr. Knipe, auditor of freight receipts of the defendant?

A. Yes, sir; for the most part.

Q. Were there any others?

A. Not that I know of.

Q. As far as you know there was no documentary evidence examined by you, except letters between the persons named?

A. There was not.

Q. Did you notice on each one of those letters of transmittal that Mr. Searles in writing to Mr. Knipe always stated that he sent herewith the claim of a certain shipper, numbering the claim and naming the shipper?

A. I remember that.

Q. That was the regular form of letters?

A. That was printed on the form.

Q. With this letter of Mr. Searles there was always transmitted, according to those forms, the claim of the particular shipper, giving his name, assigning a number to that claim and also giving in figures the lump amount of the claim as allowed by Mr. Searles. Those were on all the letters, were they not?

A. To the best of my knowledge they were.

Q. None of those shippers' statements of claim was produced at the audit?

A. No.

Q. Is it not a fact that in each letter of transmittal by Mr. Searles to Mr. Knipe, Mr. Searles would indicate in a word or two what purported to be the cause of the allowance, such as "Terminal expenses," "Unfilled contracts," "Overlapping contract" "Overcharges," etc.? There was always some such general designation, was there not, in the Searles letters?

A. I think I might say every letter we looked at the term "Terminal charges" is used. Up to a certain period, I think March 31st, 1899, that was the only description given. After that time it would say, "Terminal charges on account of overlapping contracts," or "On account of unexpired contracts."

Q. Did it not sometimes use the expression "Unfilled contracts"?

A. Sometimes "Unfilled contracts" and sometimes they designated the consignees, that is, they would say "For the Fitchburg Railway."

Q. Were not a great many such designations to steamship lines in New York harbor?

A. Yes, sir.

Q. In those cases where the contracts were referred to, were the contracts produced?

A. No.

Q. Was the reference to the contract such as would indicate the date of the making of the contract and the period of time it covered?

A. No.

Q. Taking this expression "Terminal expenses," is there anything on the face of the Searles letters to show in any way what was grouped under "Terminal expenses"?

A. Nothing.

Q. You could not say then or report from the face of these letters, as between the International Coal Mining Company and the Berwind-White Company or other competing shippers, whether the same matters were included in the designation by Mr. Searles of "Terminal expenses" or whether they were different?

A. No, they were all for Terminal expenses.

Q. But under the words "Terminal expenses" Mr. Searles connected it with the paper he was transmitting, which was the claim of the particular shipper which he transmitted, and he would just say that he transmitted the claim of the company for allowance for Terminal expenses, thus and so. There was nothing on the face of the Searles letters to show that in allowing a claim for the Berwind-White Company under that designation they were allowing for the same subject matter, the same cause that they allowed to the International under the same general designation?

A. There was nothing shown except just the term "Terminal expenses."

Q. It might be one thing or another. You cannot tell without those shippers' statements of claim that were being then transmitted by Mr. Searles to Mr. Knipe?

A. I do not know that I could tell from them. I know that I could not tell it from the transmittal letter.

Q. Whether it could be told from the claim of the shipper itself you do not know, because you have never seen those claims. Under this head of Terminal expenses there is nothing to show, as far as the letters read themselves, whether any allowance was made to the shipper. Say, for instance, the Berwind-White Company. If there was a proration between the railroad company and the shipper by reason of the trackage of the shipper being used at the initial point, there is nothing that would indicate that?

A. No, sir.

Q. So that if an allowance was made you could not get that from the letters of transmittal?

A. There were none shown on these letters of transmittal that we looked at.

Q. There was nothing that appeared to indicate any allowance at the initial point for any purpose whatever?

A. No.

Q. Now take the case of the reductions from the tariff rate that you have reported were made to the International Coal Mining Company and also to the Berwind-White Company and others, and which you have tabulated as being the same in amount apparently (as far as you could see they were the same) to all those shippers, the plaintiff and the others. Take under the head of "Terminal expenses." I want to illustrate it by the matter of boat freights.

450 For instance, boat freights from South Amboy to the point of delivery in New York harbor to the consumer, and the boat freights from the end of Harsimus Pier to a consumer in New York harbor. Is there anything to show what was the nature of

the service respectively of the International from South Amboy and the Berwind-White from Harsimus Pier?

A. Not in the letters that we looked at.

Q. For instance, if in point of fact a distance that the plaintiff had to send coal from South Amboy to a point in New York harbor was over twelve miles by water, and the tide had to be considered, and storms, and also that it took for the round trip of the boats nearly two days. If an allowance was made for boat freights under the head of "Terminal expenses," and that allowance was 45 cents to the International Coal Mining Company, and the allowance to the Berwind-White Company was 45 cents, or even 40 cents, from Harsimus Pier, is there any way under the evidence contained in the letter of transmittal of contrasting the service for which the International was being allowed 45 cents with the service that was being performed by the Berwind-White Company at 40 cents?

A. No; this letter only dealt with the shipment up to the point, and mentioned South Amboy or Harsimus, and not beyond those points.

Q. So that if, taking the allowance at 45 cents to the International covering such shipments, and assuming that to be a fair allowance, as the railroad company itself allowed it and is not in a position to question it, and on an inquiry to compare the allowance made to the International with the allowance made to the Berwind-White from the end of Harsimus Pier, if it appeared that Harsimus Pier was on the New Jersey side, but almost directly opposite to 23rd St. on the New York side, and within a very short distance of the steamers that were to be coaled, there was no method before you as auditors to determine the relative cost to the International
451 and to the Berwind-White of coaling or boat freights, going a few blocks in New York harbor from the end of Harsimus Pier after crossing, and going 12 miles the other way for the International Coal Mining Company, and there was no way of contrasting those two reductions from the tariff rate of 45 and 40 cents respectively, to show that there was any discrimination in favor of the Berwind-White Company. You had no method of going into that?

A. No.

Q. Then if it were the fact that it only cost the Berwind-White Company five cents a ton to take coal from the end of Harsimus Pier to the steamers in which it was to be loaded, there is no way from the examination that you have been making to show that there was in that very thing a discrimination of 35 cents against the International by allowing the Berwind-White Company 40 cents for doing what cost them only 5 cents, and doing it with their own plant, if such was the case, their own boats. There is no way you could go into that question from the papers produced?

A. We did not try to go into that question.

Q. You could not have done it if you had been asked to do it. There was no evidence here that would enable such a question to be inquired into?

A. Not that I saw.

Q. In the same way, in the initial allowances, where allowances

were made at the initial point for trackage of the shippers, there was nothing on these letters of transmittal to enable you to go into that question and see whether there had been any rebates covered up in the shape of allowances for trackage of shippers, too much or too little as the case might be. You could not go into that at all?

A. No.

Q. Was there anything produced before you which would show whether in point of fact after these transmittal letters went
452 from Searles to Knipe, that settlements were made with the companies on the basis of the Searles letters?

A. Nothing, except that occasionally there would be a copy of some report immediately following these letters, which would take exception to some item in the transmittal letter, which would be a reference from one back to the original.

Q. That would indicate that Mr. Knipe called Mr. Searles' attention to something that was to be inquired into?

A. Yes, sir.

Q. But, having reached that point, were not all these letters in shape, that they would simply notify Mr. Knipe that Mr. Searles had made an allowance in connection with certain claims transmitted but not produced, that there is nothing to show that after the verification by Knipe that was called for by Searles' letter, Mr. Knipe settled on the basis of Searles' letter and actually made the payment to the shipper?

A. No, there is no proof of it.

Q. There was no proof of the payment at all?

A. There was none in the books submitted to us.

Q. In the natural course of business, and from your experience in such matters in connection with such letters as those of Searles to Knipe, there would in a settlement have been certain auxiliary books and vouchers carrying the transaction out to completion, would there not, and it would not end with the Searles' letter of transmittal?

A. That all depends on the system of the railroad company. Some people handle their claims in a looser manner than that.

Q. But there is some way of following these allowances from Searles to Knipe in the ordinary course of business. There would be things for Mr. Knipe to do to carry out Mr. Searles' direction, and they would have to be evidenced by documentary proof of some kind at the time?

A. Yes, sir; such as a check.

453 Q. Or some kind of voucher or something to trace the transaction?

A. This transmittal letter might be a voucher.

Q. That would be a voucher to authorize him to do this, but it would not be a voucher as between the Railroad Company and the shipper who was getting something back?

A. No, sir.

Q. I am speaking now of vouchers between the railroad company and the shipper, to show what actually took place.

A. There was nothing like that in the records that were shown.

excepting that if the plaintiff's claims were compared—we compared the railroad company's transmittal letters with the plaintiff's claims as shown by the plaintiff's books, and found them in every instance to agree.

Q. That is to say, the claim made by the plaintiff to the railroad company and the allowance by the railroad company as far as contained in these books, were the same?

A. Yes, sir, as to the rates and so forth.

Q. Then there were no auxiliary vouchers, checks or accounts produced to show what actually took place after the Searles letter reached Mr. Knipe?

A. No, sir.

Q. What would in orderly bookkeeping naturally be auxiliary documentary evidence?

A. In the average business there might be nothing more than a check.

Q. Would not that check then be made from the railroad company to the shipper, to repay him something, and in the ordinary course of business would not that be entered in some permanent book?

A. Yes, sir; it would be entered in a record of the checks.

Q. In addition to the stubs, would it not in the regular course of business be entered in some way in the bound volumes of
454 books then in use by the railroad company, and that would show the transaction where cash had gone, that it had gone to the account of something? There would be something to indicate it?

A. In the ordinary course of business there would be.

Q. What would such a book ordinarily be called?

A. A cash book.

Q. So that we would have, first, the letter of transmittal of Searles, then the claim itself mentioned in the letter of transmittal, then some action taken by Mr. Knipe resulting in a check, and that check would in the ordinary course of business be in the cash account of the railroad company under a designation which could be followed?

A. In the great majority of railroads you would find that the cash payments are supported by a voucher.

Q. That voucher would be something to be signed by the shipper on getting the check, would it not?

A. Yes, sir.

Q. That voucher would then show upon its face that it had passed through various departments of the railroad, to keep track of what was being done?

A. Yes, sir.

Q. There would be usually more than one department? One department alone would not have the ascertaining of the amount and the actual paying of it?

A. That all depends on the size of the railroad.

Q. That is usually the case, is it not, that they are separate?

A. Yes, sir.

Q. None of those auxiliary books of any kind or vouchers were produced?

A. No.

Q. You have no knowledge whether they were the same as the allowances or not?

A. Naturally not, not having the book.

Q. Is it not a fact that practically all of these allowances
455 were what were called monthly claims, that is to say, did they not usually deal with a single month's shipments?

A. Yes, sir, one or more months.

Q. Were they not more generally a single month's shipments?

A. I might say almost always for a particular month, but sometimes one settlement might overlap two months, April and May, for example, and then in some rare instances it might be from April 1st, 1899, to March 31st, 1900.

Q. Do you recall any case of that kind where it took in a whole year?

A. I can give you a case of that kind. That is in Book B, 8, on folio 296. It is not in the tabulation, it is in the railroad's record book.

By the COURT:

Q. Was it a settlement with a competitor of the plaintiff?

A. Yes, sir. That settlement was no different from any of the others, except in the matter of dates.

By Mr. NEWLIN:

Q. Except that it was for a whole year?

A. It was for a whole year, and it was on account of unfilled contracts.

Q. With this single exception, all these are on the basis of monthly settlements, except where occasionally it was two months?

A. Yes, sir.

Q. The letter of transmittal dealt with the shipment of the month of so and so, without regard to the day of the month, and it confined the subject matter of the claim almost always to a single month's shipments?

A. As a rule, yes, sir.

Q. The claim came in pretty promptly after the expiration of the month's shipments? They were not separated by a long interval of time?

A. No, usually the next month. The transmittal letters were dated I mean the next month.

456 Q. The next month after the actual period covered by the shipments?

A. Yes, sir.

Q. Did you anywhere in any of these books come across any omnibus or general settlements, irrespective of what was being done monthly?

A. No. I do not know whether you understand how we proceeded in looking through these letters. It would take a very long

time to go through that and look at each letter. Your Mr. Wilson and our Mr. Taylor took the papers named in your statement, and they referred to the index of these books, and they got the page numbers, and then they looked at those pages. Most of these letters were these monthly settlements, and the only exceptions that I know of at all are letters referring to overcharges, claims for overcharges either on weights or rates, and we looked up each one of those and found that the rate mentioned was the tariff rate at that time.

Q. Then there was no evidence in these letters of transmittal showing what might be called a lump or general settlement or allowance differing from the monthly allowances that were being made not only to the Berwind-White Company but the International itself, and to other shippers

A. I saw none.

Q. These monthly settlements, if it is true that the tariff rate given there was the reduced rate, as a rule were upon the basis of the same rate. That is what you have reported, have you not?

A. Yes, sir.

Q. There was nothing to indicate that, outside of those monthly settlements, there were other settlements made by which money was paid by the railroad company to the Berwind-White Company and others?

A. I would not say that there were not other letters in those books, but there were no other letters for the particular competitors that you mention in your statement, excepting those we have included in our tabulation, with that exception I have just noted, and those were for the most part very small items.

Q. I will confine my question now to what I call favored shippers, those that were named in our plaintiff's statement. There is nothing to show on the face of these Searles letters that any of those favored shippers, beginning with the Berwind-White Company, the Morrisdale, and others, got anything more in those monthly allowances than the International got itself in those monthly allowances as they were made from month to month?

A. That is right.

Q. Excepting, of course, these overlappings, where you have mentioned there was a thirty-five cent allowance at a certain period and a five cent allowance to the Berwind-White and others?

A. The difference then is not in the rate. The difference is in the fact that the International did not get any settlement.

Q. In that overlapping period the record shows that the International got no money back after the increased freight rate had produced repayment to the Berwind and Morrisdale. During that period the International got no money back?

A. I do not know what you mean by the period of the increased rate.

Q. I mean the period of time covered by allowances to the Berwind, the Morrisdale and some others, on overlapping, unfilled and unexpired contracts.

A. My recollection is that was the period of a reduced rate, that the tariff rates were all reduced.

Q. No, when you come to the point, there is one year where the Berwind-White got a reduction of five cents below what the International got. Then in the next whole year the Berwind-White and the Morrisdale got back thirty-five cents a ton, where the International got back nothing?

A. That is right.

Q. In the year ending April 1st, 1899, the Berwind and
458 the Morrisdale got back on that class of unfilled contracts, etc., five cents a ton that the International did not get back for the same period of time. That period ended March 31st, 1900?

A. Yes, sir.

Q. Then it is true that from these tabulations it appears that between April 1st, 1899, and March 31st, 1900, the Berwind and the Morrisdale did get back on these South Amboy, and also the Berwind on Harsimus, five cents a ton, which the International did not get back?

A. That is right.

Q. Now, coming to the year beginning April 1st, 1900, to the end of that year of March 31st, 1901, during that whole period the Berwind and the Morrisdale got back thirty-five cents a ton, and the International got back nothing. That is true, is it not?

A. There were a number of others who also got that thirty-five cents.

Q. They all got the same?

A. Yes, sir.

Q. What were the names of some of the other shippers who got thirty-five cents?

A. There was the Berwind-White Coal Mining Company, the Morrisdale Coal Company, the Mitchell Coal and Coke Company, W. H. Piper & Co., and the Sterling Coal Company.

Q. Those are all shippers that were named in the plaintiff's statement as competing shippers who were favored in this very way?

A. Yes, sir.

By the COURT:

Q. During that time the International got nothing back?

A. No, sir.

By Mr. NEWLIN:

Q. Have you any tabulation of the shipments by the International during that period?

459 A. Yes, sir; but those shipments do not agree with the figures you show. When you mention about the tons I want to say that those tonnages do not agree with your statement.

Q. There is a difference of how much against ours?

A. The aggregate difference is about five thousand tons.

Mr. NEWLIN: We will admit that in Schedule A we have claimed for 5,000 tons more than an accurate examination of the books shows, and we reduce our claim by that amount.

Q. This allowance on overlapping contracts that was made against the International and in favor of the others, is stated here on the

actual correct tonnage. You have the correct tonnage on that of the International?

A. Yes, sir.

Q. Can you give during the year ending with March 31st, 1900, the tonnage of the International which got no five cents back, the same period that the Berwind and others got five cents back again?

A. That is just on shipments to South Amboy?

Q. South Amboy and line shipments both?

A. The reduction on tariff rates is not the same on what they call line shipments as it is for South Amboy. There are only three points on which there was a lesser rate, Bridgeton, New Jersey, Mechanicsville, New York, and South Amboy. Our statement shows all of the tonnages, irrespective of whether they got anything back or not.

Q. You have nothing here in your tabulation to show in the year in which five cents was repaid, how much we shipped in that year on which we are entitled to five cents and interest? Take that year ending March 31st, 1900?

A. To give you that accurately I will have to be excused for a few minutes to figure it up.

460 Q. Was there anything in any of these letters from Searles to Knipe that we have been speaking about, to show an allowance of fifteen cents a ton to the Berwind-White Company for handling their own coal on Harsimus Pier?

A. I saw nothing of that kind.

Q. If that was included in the general designation of "Terminal Expenses," you do not know?

A. No.

Q. Take any monthly allowance to the Berwind-White Company. It was a certain sum of money. Assuming that the tariff named is a reduced tariff, is there anything to show either in the claim that was transmitted, or in any other way, there was allowed to the Berwind-White Company fifteen cents a ton for handling that coal, irrespective of that tariff reduction?

A. No, there is nothing like that.

Q. I think you said those overlapping and unexpired contracts were not produced, nor was there any evidence or reference to those contracts in the Searles letters of transmittal which would indicate anything more than that there were such contracts with certain persons?

A. That is correct.

Q. But no date given, no time covered by the contracts, and in some cases there is not always the name of the party, is there?

A. You mean the consignees?

Q. Yes, the consignees were sometimes not even named?

A. Yes, sir.

Q. So that it would be an allowance on the basis of an unfilled contract made by the shipper with an unnamed consignee, and there would be no way at all of tracing that from what was before you?

A. As a rule it named the consignee, and you would find a great

similarity with those which omitted the consignees' names with the previous month's settlement.

461 Q. So that it might be merely an oversight?

A. An oversight that it was omitted.

Q. Those consignees were mostly steamship lines in New York harbor?

A. I would not say that. There was for glass works at Bridgeton, New Jersey, and for railroad supply.

Q. And electric work and electric companies of various kinds. Did you see any of those?

A. I saw none of those.

Q. But you saw repeated cases of contract with steamship companies which arrived and departed from New York harbor?

A. That is quite natural, because most of those referred to shipments to South Amboy, which would be for steamships, I imagine.

Q. The Berwind-White Company would want to get their coal to Harsimus Pier, to be nearer steamships themselves, where they would have to coal, but at all events the consignee named, which would naturally be the person with whom the contract was made, is repeatedly named as a steamship line located in New York harbor, the leading lines?

A. Yes, sir.

Q. It covered practically all of the leading lines of steamships out of New York harbor? They were practically all covered by these contracts of the Berwind-White Company?

A. I would not say that.

Q. There were quite a number?

A. Yes, sir.

Q. The numbers that you recall were those of leading steamship lines?

A. Yes, sir.

Cross-examination.

By Mr. GOWEN:

462 Q. In making the examination of the books which you have referred to here, containing copies of the transmittal letters, you were governed, I understand, by Mr. Wilson's designation of the shippers whose accounts should be looked into?

A. Yes, sir; together with those named in the plaintiff's statement.

Q. You examined therefore all copies of letters of transmittal which had to do with the shipments of shippers who were named in the plaintiff's statement, or who were designated by Mr. Wilson?

A. Each one of them, yes, sir.

Q. Have you before you the report covering the year 1898?

A. No, sir.

(Report shown witness.)

Q. Taking the year beginning April 1st, 1898, and terminating April 1st, 1899, did you find that in any instance any other shipper

had been charged a less rate for the carriage of his or its coal to the same destination than had been charged to the plaintiff?

(Objected to because it is impossible for this witness, with what was before him, to draw that conclusion of fact. Objection overruled. Exception noted for plaintiff.)

A. No, we found no lesser rate in that period that you mention. The period you state was up to and inclusive of March 31st, 1899.

By the COURT:

Q. Do I understand you that up to that period the competitors of the plaintiff- and the plaintiffs themselves, according to those letters, got the same rate to the same points or similar points?

A. Yes, sir.

(Counsel for plaintiff moves to strike out the answer. Motion overruled. Exception noted for plaintiff.)

By Mr. GOWEN:

Q. During that period did the plaintiff receive a reduction
463 of rate on every shipment made by it, I mean every interstate shipment?

A. Yes, sir. There are one or two little omissions in their statement of inconsiderable items. For example, they by a clerical error left out maybe forty-one tons, but otherwise they did.

Q. What was the lowest reduction on a ton that the plaintiff received during that period from the tariff rate?

A. I do not know whether I understand your question correctly. Do you mean what was the greatest reduction?

Q. What was the smallest reduction that the plaintiff received from the tariff rate during that period?

A. Twenty-five cents.

Q. What was the greatest reduction?

A. Seventy-five cents.

Q. And the allowance therefore made the plaintiff from the tariff rate varied between twenty-five and seventy-five cents on all its shipments during that year?

A. Yes, sir.

By the COURT:

Q. During that period how did the allowances range to the competitors named in the statement?

A. Just exactly the same as the plaintiff's shipments for the same points.

(Exception noted for plaintiff.)

By Mr. GOWEN:

Q. Taking the second period, that is, from April 1st, 1899, to April 1st, 1900, your examination shows that in that period the defendant charged other shippers than the plaintiff on certain of their shipments lower rates than the plaintiff paid?

A. Yes, sir.

Q. You have referred to the fact, I think, that the points to which the shipments were made on which these low rates were
464 charged, were Bridgeton, New Jersey, Mechanicsville, New York, and South Amboy, New Jersey?

A. And I find there is one other, Pittsfield, Massachusetts.

Q. What was the reduction to any other shipper that you discovered on Bridgeton shipments? What did it amount to per ton?

A. Five cents, that is, a reduction of the tariff of five cents.

Q. Five cents was allowed on account of what?

A. The transmittal letters to the Columbia Coal Mining Company were for consignments either to the Glass Works or for the Glass Works, sometimes it said "if for the Glass Works." Berwind-White Company five cent reduction was for unexpired contracts.

Q. Are you able to tell from anything that you examined whether that five cent reduction to Bridgeton made the rate during the year from April 1st, 1899, to April 1st, 1900, the same net rate that had been charged on Bridgeton shipments during the preceding year?

A. We cannot tell from our tabulations, but if there are transmittal letters in your books we can tell.

Q. You had no Bridgeton shipments during earlier years?

A. No; the plaintiff had no Bridgeton shipments. That is the reason we have not got it.

Q. As to shipments to Pittsfield, Massachusetts. What was the reduction in the case of these shipments to others than the plaintiff?

A. Twenty-five.

Q. Upon what account was that reduction granted?

A. Upon account of unexpired contracts.

Q. That made the net rate on Pittsfield shipments during that latter period what?

A. \$2.05.

Q. How does that compare with the Pittsfield rate which was in force during the preceding year?

465 A. It is identical.

Q. In other words, after April 1st, 1899, the defendant carried a shipment in the month of April, 1899, for the Berwind-White Coal Mining Company to Pittsfield, Massachusetts, at the rate which was in force during the preceding year to that point?

A. Yes, sir; at the net rate which was in force.

Q. Had the plaintiff during the preceding year made any shipments to Pittsfield at the rate which was applied to Berwind-White shipments, in April, 1899?

A. Yes, sir.

Q. At what rates were they charged?

A. They were charged a net rate of \$2.05.

Q. The same rate that was applied to Berwind-White shipments in April, 1899?

A. Yes, sir.

Q. Plaintiff did make a shipment in the year beginning April 1st, 1899, to Pittsfield?

A. Yes, sir.

Q. On which it paid what rate?

A. The tariff rate. I have no means of knowing what plaintiff paid, but the tariff rate at that date was \$2.30.

Q. You found nothing which indicated that plaintiff had received any reduction?

A. I found absolutely nothing.

Q. Take Mechanicsville. What had been the net rate applied during the year ending April 1st, 1899, on shipments to Mechanicsville made by the plaintiff and by all the other shippers?

A. \$1.35.

Q. That was the net rate?

A. Yes, sir.

Q. On April 1st, 1899, what tariff rate was put in force in Mechanicsville shipments?

A. \$1.55.

Q. That was an advance of twenty cents?

A. Yes, sir.

Q. It took effect April 1st, 1899?

466 A. Yes, sir; that is, that was the advance, not an advance in the tariff, but an advance over the net rate. The tariff in the previous period was more than that.

Q. But while in point of fact there was an actual reduction made April 1st, 1899, in the tariff rate to Mechanicsville, the result was an actual advance in rate, because after that date the tariff rate was adhered to, except as to those unexpired contracts, while under the previous years there had been a reduction of forty-five cents a ton from the tariff rate allowed to all shippers?

A. That is correct.

Q. So then, I understand you to say that the rate to Mechanicsville prior to April 1st, 1899, the net rate, had been \$1.35?

A. Yes, sir.

Q. That was paid by the plaintiff and by all other shippers?

A. Yes, sir.

Q. On April 1st, 1899, that rate was advanced to \$1.15?

A. Yes, sir.

Q. The plaintiff, according to your report on shipments made in 1899, paid \$1.55?

A. Yes, sir.

Q. There were certain shipments made for the Berwind White Coal Mining Company and the Morrisdale Coal Company on which the rate of \$1.35, that is, the rate which prevailed during the preceding year was applied?

A. Yes, sir, the net rate.

Q. In all cases those adjustments of \$.20 a ton were stated as having been made either on account of unexpired contracts or on account of shipments for the Fitchburg Railroad?

A. Or for overlapping contracts.

Q. The one other point is South Amboy. What had been the net rate in force to South Amboy during the year ending April 1st, 1899?

467 A. \$.90 was the net rate.

Q. After April 1st, 1899, was that advanced?

A. The tariff rate was \$.95 after April 1st.

Q. So that there was an advance on that date as over the net rate prevailing before that time of five cents a ton?

A. Yes, sir.

Q. Did you find any adjustment of rate made to any other shipper than the plaintiff on South Amboy shipments during the year 1899 which exceeded five cents a ton?

A. None.

Q. In the case of the adjustments which were made equal to five cents a ton, the adjustments were stated to be made either on account of unexpired contracts, or in some cases the names of the consignees were given, the contracts not being referred to?

A. That is correct.

By Mr. NEWLIN:

Q. They were five cents lower than the International?

A. They were five cents lower than the tariff rate which the International got.

By Mr. GOWEN:

Q. Coming then to the period after April 1st, 1900, on April 1st, 1900, was an advance made in the rate to South Amboy?

A. Yes, sir; in the tariff rate there was an advance.

Q. To what figure?

A. An advance of thirty-five cents.

By the COURT:

Q. To \$1.25?

A. \$1.30. The rate had been \$.95.

By Mr. GOWEN:

Q. I am referring to the tariff rate after. The plaintiff after April, 1900, made shipments to South Amboy?

468 A. Yes, sir; they made shipments in April, May and June, and from August to February, 1901, inclusive.

Q. I understood that there were no adjustments made with the plaintiff during that period?

A. Yes, sir, that is correct. That is, we found no transmittal letter for the plaintiff.

Q. The adjustment continued with other shippers, based upon an application of rates previously prevailing for that year on shipments made on account of unexpired contracts?

A. Are you referring now to the last year of this examination?

Q. Yes, after April, 1900.

A. There was an increase of five cents a ton in that net rate in this last year. That is, it was increased from ninety cents to ninety-five cents for plaintiff's competitors on account of new contracts, and so forth.

Q. In point of fact, after April, 1900, the shipments to South Amboy, which represented shipments under unexpired contracts,

were carried at thirty-five cents a ton less than the plaintiff's shipments?

A. Yes, sir.

Q. Have you the plaintiff's shipments to different points?

A. Yes, sir.

Q. What date do you start with?

A. April 1st, 1899.

Q. You began with July, 1898?

A. Yes, sir, up to April 1st, 1899, there were no differences.

Q. I am speaking now of the volume of the plaintiff's shipments?

A. The volume of the plaintiff's shipments is only shown to that time or in that period when there was a difference. For Bridgeton, New Jersey, the plaintiff's shipments were fifty-nine tons. For Mechanicsville, New York, 9,044 tons. For Pittsfield, Massachusetts, 25 tons. For South Amboy, 12,251 tons.

469 By the COURT:

Q. That is during what time?

A. During the period from April 1st, 1899, to April 1st, 1900.

By Mr. GOWEN:

Q. Go on.

A. From April 1st, 1900, to July, 1900, the South Amboy shipments were 4,653 tons. From July 1st, 1900, to April 1st, 1901, the plaintiff's shipments were 11,822 tons. I think that is all.

Q. In examining the copies of the transmittal letters covering the adjustment of rates made with others than the plaintiff, how was the point of origin of the shipments designated?

A. Usually as Clearfield region. We did not take anything excepting the Clearfield region.

By the COURT:

Q. Did that include all these, Tyrone, Altoona, Cresson, and so forth?

A. Yes, sir; we were told by counsel for both sides that that was all that would be necessary to take, because those points are in the Clearfield region.

Q. I want to know whether the letters indicate that?

A. The letters just say Clearfield region.

By Mr. NEWLIN:

Q. The letters both for the International and for others use this same designation, Clearfield region, as the initial point?

A. Yes, sir.

J. CHESTER WILSON, recalled.

By Mr. NEWLIN:

Q. You took part in this audit as to which Mr. Riekey has been examined?

470 A. Yes, sir.

Q. You were there throughout?

A. Yes, sir.

Q. Speaking of the books that were produced on April 29th, and dropped out on examination, about how many were there according to your count that were dropped out?

A. Fifty dropped out and fourteen contained relevant matter.

Q. So that out of sixty-four books that were produced you were yourself of the opinion that fifty of them contained nothing that had anything to do with the controversy, and with your consent they were excluded?

A. Yes, sir.

Q. This whole inquiry for this whole length of time has been on fourteen out of sixty-four books?

A. Yes, sir.

Q. What was the nature of the settlements made by Mr. Searles which are contained in these letters of transmittal? What were they known in the coal trade as?

A. I never heard a name given them until this trial, transmittal letters.

Q. I do not mean the letters but the settlements. They were called monthly settlements, were they not?

A. They were made about monthly, not always.

Q. But as a rule there were settlements made monthly?

A. Yes, sir.

Q. With each settlement went a statement of the shipments. Take the case of the International. When you had a monthly settlement in each case you offered or presented to Mr. Searles a claim that gave the car numbers and times of shipments and tonnage?

A. The point from which shipped and the destination.

Q. Both the initial and the delivery point, the tonnage, the date and the car numbers?

471 A. Yes, sir.

Q. That was the customary way of presenting such a claim?

A. Yes, sir.

Q. All these claims that have been gone over here and that you assisted in examining, were of the kind commonly known as monthly settlements, I mean made for monthly periods?

A. Yes, sir. I observe letters such as Mr. Rickey referred to that carried in one case a year.

Q. But there were no omnibus settlements in any of these letter books that were examined?

A. Not omnibus, meaning for a round period of years.

Q. Or for a round sum of money without regard to why it was paid?

A. No, sir.

Q. Have you made a memorandum of omnibus settlements that were made with the International Company, outside of these monthly settlements, by which the International got money other than of the description of monthly settlements?

A. There were none within the period of the suit.

Mr. NEWLIN: What I propose to do is this. In order to test the accuracy of these letter books as showing all the money transactions

for returned freights between the shippers and the railroads, I propose to show that in the period covered by the plaintiff's statement and covered by the very books that were produced by the railroad company, these letter books, that during that same period of time a certain number of omnibus settlements were made with the International, and it was paid sums of money which would have been included in the dates of these letter books and would appear in them if the letter books gave the omnibus settlements, and that they

472 did not appear, and I will show that we got at certain times through these settlements in advance of the monthly settlements omnibus or general settlements that were in excess and beyond these monthly ones, and to show that this witness's examination of the books showed that none of those allowances are contained in those letter books. I propose to follow that up later on by going into the subject of omnibus settlements. It is excluded by the statute of limitations under your Honor's ruling, and I am inquiring as to the way these books were kept, that is to say, that in the books which were produced there were only the monthly settlements with shippers, whereas during the same period of times covered by dates of some of these books which were produced here and were used by Mr. Wilson in making his preliminary examination, that our own omnibus settlements do not appear.

(Objected to. Objection sustained. Exception noted for plaintiff.)

Q. In making this audit were the State shipments taken into account?

A. No, sir.

Q. Was it possible in going through the audit, where State shipments were left out, or were in the transmittal letter, from anything on the face of the letter to show how much of the gross allowance went into Interstate shipments?

A. It was not.

Q. So that on a given date in a given letter, where a certain sum is allowed by Mr. Searles and transmitted to Mr. Knipe, you could not from the information contained in that transmittal letter say how the charge per ton was reduced as to Interstate shipments. It did not give such information?

A. It only gave the net rate to be applied to the shipments, and the result was a total of all, without any separate setting forth of State or Interstate.

Q. So that you could not tell what Mr. Searles proposed
473 to allow on Interstate and what he proposed to allow on State?

A. In the matter of money.

Q. There was nothing to show that any of these settlements were really carried out?

A. No; no receipts.

Q. None of these shipper's claims as numbered were before the audit?

A. No, sir.

Q. Under the head of "terminal expenses," where allowances were made to the International, your own company, and which have been reported on here, where there were reductions in the tariff rate under

"terminal expenses," what in point of fact was included in "terminal expenses"? I am speaking now of South Amboy. You could not ship anything to Harsimus Pier?

A. We could not. I do not know what all goes in to "terminal expenses," or what it means. That was the charge, as I would call it from the transmittal letters, for the auditor to follow. That appeared in all letters containing rebates paid to anybody.

Q. But you could not tell, as between your own company and others, what was included in "terminal expenses"?

A. No.

Q. Take, for instance, the matter of boat freights. What were you allowed as terminal expenses in the transmittal letters?

A. Boat freights the same as others from South Amboy.

Q. What was allowed to the International?

A. Forty cents, I think, in that period per gross ton.

Q. Under boat freights and boat service, what actually was done with the shipments of the International at South Amboy? What did you have to do to reach customers in New York Harbor?

A. Under an agreement to deliver at a point in New York

474 Harbor, boats were hired in the market and sent to South Amboy. They took the cargo from our cars and delivered according to orders, under a contract of payment by the ton for their boating service, which usually amounted, as I recollect it, to from 18 to 22 cents per gross ton.

Q. When you reached South Amboy were there any facilities there for the storage of coal, waiting a customer?

A. We never had any.

Q. You had to have the customer ready, or pay on the detention of the cars?

A. The detention of the boat and cars.

Q. In other words, if you had not a customer ready there was no place to dump your coal, waiting a customer at South Amboy?

A. No; once in the boat the charges were for prompt delivery and prompt receipt of the coal into the boat.

Q. How far was it from South Amboy to a point of delivery in New York harbor?

A. I think about twelve miles.

Q. Was the carriage affected by the question of tides between South Amboy and New York harbor?

A. Yes, sir; boats always had to go and come according to the tide.

Q. What was the usual round trip of a boat?

A. Two days from the time the boat was to start out of New York until it reached the starting point with the coal.

Q. In other words, you were two days further off from a purchaser of your coal in point of delivery? It would take you two days longer to deliver the coal as a rule?

A. It took that time.

Q. You know where Harsimus Pier is in the harbor?

A. Yes, sir; as I noticed from the passenger boats.

475 Q. It is beyond the Jersey City passenger station, towards what direction?

A. Further up the river, on the same side as the Jersey City train sheds.

Q. Opposite what corresponding landing in New York City?

Q. I do not know.

Q. Approximately?

A. I observed it from the 23rd Street boats soon after leaving 23rd Street.

Q. Then it is opposite or nearly opposite the 23rd Street ferry on the New York side?

A. It is further down a little.

Q. Some of the large Trans-Atlantic steamers are within a very short distance of the end of Harsimus Pier?

A. Yes, sir.

Q. Are not the bulk of them within looking distance, within a very little distance in the harbor, from the end of Harsimus Pier?

A. Yes, sir; as compared with South Amboy.

Q. The carriage then from Harsimus Pier, or the end of Harsimus Pier, to the consumer, the steamship company, to take that as a class, was only that distance as compared with your distance at South Amboy?

A. Yes, sir; it would be in the case of large passenger steamers.

Q. They were within the harbor there. That is their sailing place?

A. Yes, sir.

Q. What would be a reasonable price or cost for delivering coal by boat from the end of Harsimus Pier to the nearby steamship lines, as contrasted with South Amboy, or leave South Amboy out and just take the boat cost from Harsimus Pier to the steamship. How much per ton do you think would be a fair cost?

A. I have no means of knowing, but I should judge in a large business it could be done for very little over 5 cents, surely under 10 cents a ton.

476 Q. You think it would be done for a little over five and certainly not more than ten cents a ton?

A. Under ten.

Q. It would be under ten in any event?

A. Yes, sir.

Q. So that if it is a fact that you were allowed a certain amount as boat freights under the head of "terminal expenses," and if the Berwind-White Company were allowed under the same heading 40 cents, it would be anywhere from 30 to 35 cents more than it would cost to boat the coal from Harsimus Pier to the steamers?

A. They were allowed five cents less as a rule, so I understand.

Q. Not even with 5 cents less, the amount allowed them, 40 as against your 45—

A. 35 and 40 are the comparison.

Q. 40 allowed you and 35 to the Berwind-White Company, on your basis of the cost of carriage, there would be an amount that it would cost the Berwind-White at 5 cents, as against 35, which would be the difference of 30 cents, or if it was 10 cents it would be 25 cents?

A. The amount allowed them was either 30 cents or 25 cents more than the cost of taking the coal by boats.

Q. And in their case there was no loss of time by reason of the distance and waiting for the tide?

A. That is true.

Q. So that the situation in that respect was favorable to them in these particulars?

A. It was.

Q. It was less cost to boat the coal, and there was no delay. They could do it immediately. That is to say, the tide did not interfere with the delivery of coal right inside of the harbor there?

A. I so understand.

Q. Do you know anything of an allowance having been
477 made to the Berwind-White Company of fifteen cents a ton for handling their own coal on Harsimus Pier?

A. I do not.

Q. If there was any such allowance to them, was it indicated, or would it appear by anything in those letters of transmittal?

A. No, sir.

Q. From your acquaintance with the coal business, and being in it yourself, can you think of anything else that would naturally come in under the head of terminal charges, other than these boat freights, I mean on the Harsimus and South Amboy shipments?

A. The geographical position was valuable in many ways, as to ability to quickly meet a demand for coal in New York Harbor.

Q. You have testified before in this case that you were not allowed to make overlapping contracts. What was the commercial effect of not being allowed to make overlapping contracts and your competitor being allowed to make them. Was it not an advantage to the competitor to be able to make overlapping contracts running for a certain period of time?

A. It was all the advantage covered by any advance in rates, or anything affecting the charge per ton.

Q. In addition to that, was not the effect of allowing the Berwind-White Company to make overlapping contracts, continuous for a term of years, commercially to prevent any other shippers getting those same people for customers, for instance, steamship lines and other railway lines?

A. It surely had that effect.

Q. That had a commercial value in itself, irrespective of what money might be gotten back from the railroad company on the tariff rate by an overlapping contract?

A. It surely had.

Q. Do you know as to steamship coal in New York Har-
478 bor, whether there is anyone except the Berwind-White Company shipping from Harsimus Pier, that has any of that business at all?

A. They are the only shippers over Harsimus Pier.

Q. Have they not a practical monopoly of the coal furnished in New York Harbor for steamship purposes?

A. No. The Morrisdale Company had some.

Q. That is another company that had protected contracts. I am speaking of shippers having protected contracts for the delivery of coal in New York Harbor, whether by way of Harsimus Pier or otherwise, that those who had the protected contracts practically had the whole trade with steamship coal for delivery in New York Harbor. Is not that so?

A. They practically had a monopoly of that business.

Q. And have had it for how long?

A. I could not say.

Q. Did they have it during the period of your shipments that are now being sued on?

A. Yes, sir. We have the evidence of it from the 1st of April, 1900, if not from April 1st, 1899.

Q. You have evidence of it, how?

A. That unexpired or overlapping contracts were made and protected.

Q. You have that evidence. I am getting at the commercial value of that discrimination in favor of the Berwind-White Company. What do you consider was the commercial value of that discrimination, in addition, of course, to others that we will consider, but simply the facility of delivering coal by way of Harsimus Pier and making long term contracts, as with steamship companies, to deliver the coal, and having those contracts protected, in the getting of trade? What was the commercial value of those considerations shown by the Railroad Company to the Berwind-White Company? What would you estimate them to be worth per

479 ton in business, aside from the difference of actual money gotten back on protected contracts? What was the commercial benefit to the Berwind-White Company in being in a position to have their contracts protected from future increase in rates, and to be in a position to say to a customer, "We can make a contract with you for a term of years at a fixed rate, and deliver from Harsimus Pier?" Taking all those into consideration, what was the commercial value to the shipper, the Berwind-White Company, as against yourself, of the facility to make those arrangements and get those concessions?

A. That would be very hard to estimate.

Q. You were selling coal yourself. This company was at that same period of time, and I am speaking of the same period of time, and the same shipments of coal. What advantage would it have been to you during that period of time, in your opinion, if you could have made such contracts as the Berwind-White Company were making, overlapping and protected, and also have had the use of Harsimus Pier, instead of being at South Amboy? What would that, in your opinion, have been worth to you in disposing of the very coal that you carried, which is in this controversy?

A. Not limiting it to coal that was carried, but to the possibilities of business, it might have been worth 50 cents.

By the COURT:

Q. It would be worth 50 cents to the coal carried?

A. Probably not. I had a little difference in my thought.

By Mr. NEWLIN:

Q. Explain it.

A. The future business considered with the present business, in leading to a final monopoly, might be worth as much as half a dollar, but on the coal that was carried at the time I would not think it would be worth anything like that.

480 Q. How much would it be worth on the coal actually carried, that is to say, the liberty of making better terms with customers that you could get if you had the facilities of the Berwind-White Company as against what you had with what you could do?

A. Of course, it must be a rough estimate. I would cut it in two.

Q. You would say it was worth 25 cents a ton in advance of what you were getting? It was a discrimination against you of five cents, without regard to future business and without regard to business that you were not doing?

A. Yes, sir.

Q. Confining yourself therefore to the actual coal that you did ship and sell, and which is in this suit, it was in your opinion an actual discrimination against you to the extent of at least 25 cents a ton on all shipments you made that are in this suit, in favor of the Berwind-White Company?

A. It about resolves itself to that I presume on your line of questions.

Q. In other words, in your opinion you could have done better with your coal by the amount of at least 25 cents a ton if you could have done what the Berwind-White Company were doing, make overlapping contracts for long terms of years, and deliver from Harsimus Pier, which was not only nearer but was not affected by tides and other considerations?

A. Yes, sir.

Q. That is entirely irrespective of whether or not there was this 5 cents' allowance for handling the coal on Harsimus Pier?

A. I left that out.

Q. In this calculation you have also left out the question of whether there was any prorating at the initial points in favor of the Berwind-White Co., by allowing them for the use of their own tracks just as if they were another railroad. You have not taken that into consideration either?

481 A. Not at all.

(Recess until 2 p. m.)

(After recess, 2 p. m.)

J. Chester Wilson (Testimony Continued.)

By Mr. NEWLIN:

Q. Referring to the commercial advantages of the situation at Harsimus, as against South Amboy, one thing would be a difference in boat rates for delivery in New York Harbor. Isn't that so?

A. That is true.

Q. And that would amount, anyhow, to how much a ton? What would be a fair estimate?

A. Probably ten cents.

Q. Ten cents a ton. Referring to continuous overlapping contracts, with the protection against freight increase, as a means of getting customers, and also to the difference between having occasional customers and regular customers, at fixed periods and for fixed deliveries, on long contracts, what, on that basis alone, would you think to be a fair amount of the commercial value of the discrimination—and having such facilities as have been described in your examination?

A. A single large customer is better than many scattering ones, in economy of handling. I wouldn't know how to estimate it in cents per ton.

Q. Is there anything in the employment of labor—having the time occupied fully, where you have continuous contracts for large deliveries and fixed times, as against the uncertainty of casual consignees?

A. That would be an item in the consideration. The unexpired contract feature that you asked for is one that gives the guarantee of ability to do the business and to be relied upon without change or interference of a coal year as applied to railroad freight rates.

Q. Now, during this period of your shipments that are 482 in this list, you, as a coal man, were familiar in a general way with the class of customers that Berwind, White & Co. had in New York Harbor, such as the steamers, &c.

A. Only to know they were very large consumers; yes.

Q. Now, was it possible to get that kind of business away from them, with the facilities that they had? Could a person coming to South Amboy, like yourself, compete with them at all on equal terms?

A. No.

Q. You simply couldn't get the customers?

A. Couldn't get the customers.

Q. Does that apply, not only to steamer coal, but to any coal used right in the harbor of New York and delivered in the Harbor of New York?

A. It would be trade with reference to large consumers.

Q. And all that class was practically unapproachable and couldn't be got away from Berwind, White & Co. during this period, with the facilities we are speaking of, which were enjoyed by them.

A. That is true.

Q. And taking all those into consideration, are those the reasons on which you base your estimate of a commercial advantage equal to 25 cents a ton?

A. Yes.

Q. But you could have got a profit of 25 cents a ton more than you did on the actual shipments you made that came to South Amboy or came anywhere, on your line shipments. How is that?

A. I don't understand your question.

Q. Does that apply to both South Amboy and line shipments—the same conditions?

A. For the same destinations of line shipments?

Q. For the same destinations that you had, that Berwind, White & Co. had, outside of Harsimus pier. I am talking about line shipments. That where you are shipping to similar points, and
483 such points as are in your Schedule A, would this same commercial advantage that you have named, of 25 cents a ton, prevail in the case of line shipments where Berwind, White & Co. had the same shipping points?

A. No.

Q. Not as much?

A. Not as much.

Q. How much would it be on line shipments on some kind of an estimate?

A. The difference between having our business continued at the old rates to line points at the period of the protection given others on unexpired or unfilled contracts.

Q. Take Mechanicsville, for instance.

A. Taking Mechanicsville, we were unable to get any trade. It was practically ruination of the trade not to have contracts that carry at a price that by that protection would help us to make a single sale.

Q. In other words, you couldn't reach the kind of business that Berwind, White & Co. had, even on the line shipments, by reason of the overlapping contracts and other charges that have been described in your examination. You couldn't reach those customers at all.

A. We couldn't and didn't, and didn't because we couldn't.

Q. With these advantages, if you had had the same facilities for the line shipments, through the contracts of the kind you have been describing, what do you think would be your commercial advantage in the line shipments, for instance, Mechanicsville and other places?

A. Those are hard figures to estimate.

Q. I understand you to say it would have been less than to South Amboy.

A. Yes.

Q. Now, how much less do you think it is fair to estimate it at?

A. Well, if the business is worth anything, it is worth ten cents.

484 Q. There was at least an advantage of ten cents you would have had on what I might call line shipments, if you had had the same facilities as those who could make overlapping contracts and protect against increasing freight rates.

A. The protection was twenty cents at the period I refer to.

Q. But that is a separate thing I am speaking of. I am speaking of the profit you could make out of your coal, just from the geographical position and everything of that kind, and the facility of protecting against increase of freight rates, irrespective of what was paid for an overlapping—leaving all that out and taking the commercial situation.

A. My answer would apply. Ten cents, as I remember.

Q. As against twenty-five cents at South Amboy. And this doesn't include any speculative, possible business you might have got, that you didn't have. I mean exclude all that.

A. It would exclude that.

Q. Referring to the matter of the employment of labor, as between casual customers and regular, steady customers, for fixed rates; is there an advantage in that, in having the steady customers and the cost of labor such as comes from having the labor constantly employed?

A. There would be, in handling your own coal on the pier under lease or any other arrangement.

Cross-examination.

By Mr. GOWEN:

Q. The International Coal Company is not itself a miner of coal?

A. No, sir.

Q. When was it organized?

A. 1894.

Q. What was its capital?

(Objected to by plaintiff.)

485 Q. How did you get the coal that you shipped?

(Objected to by plaintiff.)

Q. How did you get the coal that you shipped, which is embraced in this action?

A. We bought it from persons who had mines.

Q. From what points did you make the shipments?

A. Over Tyrone scales, Bellwood scales—

Q. I am not speaking of the scales. I say from what points?

A. From Osceola Mills.

Mr. NEWLIN: I want to show the witness this schedule of shipments.

The WITNESS: I know them all.

By Mr. GOWEN:

Q. Just tell us what points you did ship from?

A. Osceola Mills, Spangler, Six Mile Run—Saxton rather, for that is the scale point—Bens Creek; all in the Clearfield region. I can't think of any others. There may be others.

Q. Which of those points are on the line of the Pennsylvania Railroad Company, and which are off?

A. As I understand it, they were all on the Pennsylvania Railroad line, except the Six Mile Run shipments, which were from the Huntingdon & Broad Top Railroad?

Q. How about Saxton?

A. That is it.

Q. That is what?

A. That is the Huntingdon & Broad Top Company's weighing point.

Q. Six Mile Run and Saxton are the same.

A. Yes. There are three different mines there, but the Centre is only a few miles away on the road to Philadelphia.

Q. Where did the shipments originate which you refer to in your statement as having been shipped from Altoona?

486 A. As to the weighing point for the coal, from Bens Creek and Lilly, and probably South Fork.

Q. Where did the shipments that you referred to as made from Cresson originate?

A. From Spangler and probably some other points on the Cresson branch—Cresson Division.

Q. And where did the shipments originate that were made from Tyrone?

A. Osceola Mills—Osceola, I think, probably—principally.

Q. Now, the Berwind-White Coal Company was a miner of coal.

A. Yes, sir; and purchaser also. They purchased my coal.

Q. At what points?

A. At Greenwich Point.

Mr. NEWLIN: They are not the shipments that are in this suit.

Mr. GOWEN: I don't know. We will find out.

By Mr. GOWEN:

Q. What other points?

A. I don't recall any others. I think some from Bens Creek.

Q. What do you mean—that they purchased at the mines from you?

A. Yes.

Q. Do you know where the Berwind-White Coal Company mines are located?

A. Some of them; yes.

Q. You don't know where all of them are?

A. No.

Q. Where are those located that you know of?

A. Some in Clearfield County and some in Cambria County.

Q. On what lines of railroad?

A. Pennsylvania Railroad and—I don't know whose line it is—the Scalp Level. I don't know whether it is Pennsylvania Railroad or Berwind-White.

487 Q. How about the Morrisdale Coal Company? Is that a miner of coal?

A. Yes, sir; miner, and purchaser also.

Q. Did you ever sell any coal to the Morrisdale?

A. Not in that period.

Q. Where are their mines located?

A. Clearfield County; mostly in Clearfield County.

Q. On what line of railroad.

A. Pennsylvania lines.

Q. The Sterling Coal Company—is that a miner of coal?

A. Yes.

Q. Where are its mines located?

By Mr. NEWLIN:

Q. Is it a purchaser, too?

A. I think so.

By Mr. GOWEN:

Q. Where are its mines located?

A. In, I think, it is Clearfield County. They have some in Clearfield County. I have been at some of their mines. I don't know the county lines in that particular section.

Q. On the line of the Pennsylvania Railroad?

A. Yes.

Q. The Mitchell Coal and Coke Company—where are its mines located?

A. Clearfield and Gallitzin, whatever county that is in. I don't know whether it is Blair or Cambria.

Q. Is that on the line of the Pennsylvania Railroad?

A. Yes.

Q. All its mines?

A. Yes.

Q. W. H. Piper—where are their mines located?

A. Cambria County, near Bens Creek.

Q. On the lines of the Pennsylvania Railroad?

A. Yes.

488 Q. You say that the International Coal Mining Company purchased the coal it shipped.

A. Yes.

Q. Paying for it at what point?

(Objected to by plaintiff. Objection overruled. Exception to plaintiff.)

A. At the mines.

Q. You purchased it, then, from the various operators who produced coal, paying for it an f. o. b. price at the mines. Is that correct?

A. Yes; in a large majority of the cases. It would be a very singular exception if it were not done in that way; it would be a very rare exception.

Q. Was there any particular miner from whom you purchased coal other than at a price f. o. b. at the mines?

(Objected to plaintiff. Objection overruled. Exception to plaintiff.)

A. None that I recall.

Q. Can you recall any purchases you made f. o. b. the mines?

A. Recall any purchases made f. o. b. the mines?

Q. F. o. b. the mines; yes.

A. Yes.

Q. Now, just tell from what operators you made purchases f. o. b. the mines.

A. D. Lachman & Co., Altoona; Thomas C. Hines, Osceola Mills;

Harvey Coal Mining Company, Broad Top, with offices in Philadelphia, and a few scattering ones elsewhere in the Clearfield region.

Q. Now, then, tell us from what operators you bought at a price delivered at the point of destination.

(Objected to by plaintiff. Objection overruled. Exception to plaintiff.)

A. I don't distinctly recall any in that period.

Q. Have you any book in Court, by referring to which you can tell us?

489 A. All books are here with reference to shipments. If there would be any, it would be found in these books; but I can't recall shipments purchased at delivery points.

Q. I won't stop for that. Have you any book here, to which you can refer, which will show the freight paid by you on the coal which is embraced in this action?

Mr. NEWLIN: That is shown by these very schedules.

Mr. GOWEN: Nothing is shown about the payment of freights.

The WITNESS: You refer to our actually paying the freight.

By Mr. GOWEN:

Q. Yes.

A. With our own money or check?

Q. Yes.

A. There was a time when we prepaid the freight to probably South Amboy, but I am sure to Greenwich. Outside of that, there is very little that we actually paid the freight upon by our own check.

Q. Then, your books contain no entries which will show payment of freights made by you on the great bulk of this coal. Is that the case?

A. That is the case.

Q. Now, taking your Mechanicsville shipments, which you embrace in this action; to whom was that coal sold by you?

(Objected to by plaintiff. Objection overruled. Exception to plaintiff.)

A. One of the best customers was the James J. Childs Coal Company, and they paid the freight and sent us the freight bill as a credit against our charging them with the delivery price. We have a large quantity—or had a large quantity—of those freight bills.

I have some now, but not a full lot; we didn't save them.

490 Q. That is, if I understand it, that in the case of the James

J. Childs Coal Company, you sold the coal to them at a price delivered at Mechanicsville?

A. Yes, sir.

Q. And they paid the freight and remitted you the balance.

A. Remitted us the balance, together with the freight bill received.

Q. Now, how as to the other persons to whom you shipped to Mechanicsville?

A. To a similar point, W. G. Morton, of Albany. It was the same way. There was no difference in any of those people with regard to selling at the delivery point. We didn't in all cases get back the freight bill. We knew what the freight was.

Q. Mechanicsville, as you know, isn't on the line of the Pennsylvania Railroad.

A. That is true.

Q. How did you make the shipments to Mechanicsville?

A. By learning the routing and giving it to our mines from which the coal was to start—routing—and the Railroad did the rest.

Q. Do you know how, in point of fact, they were routed—your shipments?

A. I have been out of business so long I have forgotten those routings; via the New York Central and things of that sort.

Q. Take Pittsfield, Massachusetts. That isn't on the line of the Pennsylvania Railroad, either.

A. No, surely not.

Q. Were the freights paid to you on your shipments to Pittsfield, paid in the same way as on the shipments to Mechanicsville?

A. Yes, sir. As I say, we didn't always get the freight bills back. We didn't care for them.

Q. Now, is the same thing true about Bridgeton shipments?

A. As to the basis of price; yes.

491 Q. What do you mean by "as to the basis of price?"

A. The freight included with the price of the coal.

Q. Haven't you got some book here which will show the price you actually received from the J. J. Childs Coal Company on shipments made in any month to that firm, at Mechanicsville?

A. I am not sure our sales book doesn't show; at least, I haven't got it or haven't had it for years.

Q. Where is it?

A. When the International ceased shipping, part of the books were taken care of by the President and part by myself, and some of them have gotten out of sight entirely. I don't remember seeing the sales book for years.

Q. Take your shipments to South Amboy. There was no local consumption of coal in South Amboy, I presume.

A. None whatever, that I know of.

Q. South Amboy was simply a point in New York Harbor to which you shipped, and from that point the coal moved by water to its ultimate destination?

A. That is right.

Q. The rate which governed those shipments was the New York Harbor rate, was it not?

A. Yes, sir.

Q. And out of that New York Harbor rate an allowance was made to you and all other shippers to South Amboy, or forty cents a ton, to cover the boat freights.

A. Yes, sir.

Q. Incident to the delivery of the coal in New York Harbor.

A. Yes, sir.

Q. Harsimus, to which you have referred, was a point similar to South Amboy, in the sense that it wasn't the terminus of the coal, but was another New York Harbor delivery point.

A. As I understood it; yes.

492 Q. And the New York Harbor rate applied to shipments to Harsimus, but instead of an allowance of forty cents for boat rate, there was an allowance of thirty-five cents.

A. So I have learned from the examination.

Q. So that the railroad rate to South Amboy was five cents a ton less than the railroad rate to Harsimus, when the shipments were intended for New York Harbor delivery.

A. Yes.

Q. Now, in point of fact, the shipments through South Amboy went to a great many other points than New York Harbor points.

A. Yes.

Q. But without regard to the fact that they went to New York Harbor, or went along Long Island Sound or went to some points in New England by water, the rate was the New York harbor rate less the forty cents?

A. Yes, sir.

Q. And I suppose the same is true as to Harsimus. The deliveries to Harsimus were confined to New York Harbor points, were they, from your knowledge of the business?

A. No, sir.

Q. But they moved from Harsimus to the ultimate destination?

A. Yes.

Q. During the year ending April 1, 1899, you received on all the shipments that you made during that year, which are embraced in this action, adjustments or rebates, or whatever you may choose to call them, from the tariff rate?

A. Yes.

Q. And those rebates vary from twenty-five to seventy-five cents, do they not?

A. Yes, sir.

Q. I should like to know how you explain—because I want to give you a chance to explain—this statement in your statement of claim, that you swore to: "The plaintiff further avers
493 that prior to April 19, the plaintiff from time to time received rebates from the defendant, varying from 10 cents to 25 cents per ton, and that the claim is made for a further rebate of 15 cents per ton to 45 cents per ton, for the amounts now due by the defendant to the plaintiff, in excess of the rebates heretofore paid by the defendant to the plaintiff, on account of said shipments."

(Objected to by plaintiff, because it refers to a period of time now excluded.)

Q. How did you come to make such a mistake in stating the actual rebates which you received?

A. By not stating enough, do you mean?

Q. By saying they varied from 10 to 25 cents, when in point of fact they varied from 25 cents to 75 cents.

A. Well, they varied from 10 cents to a higher figure, not to say

what the limit would be. The 75 cents you refer to is on a very small tonnage, in a single instance, namely, shipments to a point on the Long Island Railroad, I think. That was a rare instance, and really overlooked. I never appreciated that there was 75 cents paid until notice was called to it in this meeting this morning. I hadn't observed that the expert brought it out that way, even in the examination.

Q. During the year preceding April 1, 1899, what were your rebates on your shipments to Mechanicsville?

A. (Referring to paper.) 45 cents.

Q. What on your shipments to Pittsfield, Mass.?

A. 50 cents.

Q. Albany, New York?

A. 45.

Q. Long Island City?

A. 75.

Q. Green Island.

A. The same as Mechanicsville, whatever it is—45.

494 Q. In the very great majority of cases, in the case of shipments made during that year, didn't your adjustments amount to 45 cents or over per ton?

A. Yes, sir; it seems now they did.

Q. If you have any explanation to make, I would like to know what it is, as to the statement which you swear to in this case, that you received, prior to April 1, 1899, rebates running from 10 to 25 cents per ton.

A. I don't know that there is any explanation for that. It is there, and it wasn't saying enough. If my attention had been called to that, I certainly would have made the last figure higher. That was probably written when I wasn't looking at the matter as carefully as I might, with reference to the highest amount paid.

Q. Didn't you furnish the figures to your counsel, on which he prepared this statement?

A. Yes, sir; I did.

Q. Now, I wish you would turn to November, 1898, shipments made by your Company.

A. Yes, sir. (Referring to paper.)

Q. What did you pay on the shipments made by your Company to Albany in that month?

A. \$1.80.

Q. What do you want the jury to understand by that—that that is the rate you paid?

A. Yes, sir; that is my recollection of it.

Q. Did you pay any freight, yourself, on that coal?

A. Do you mean whether I paid it?

Q. Yes. I ask you that question now.

A. No, sir. I explained it a while ago, I didn't.

Q. Paid by the consignee?

A. Paid by the consignee.

By Mr. NEWLIN:

Q. On your account.

A. On our account.

Q. And the balance remitted to you out of the price.

A. Yes.

Q. At delivery.

495 By Mr. GOWEN:

Q. What rate of freight was deducted from that shipment by your purchaser?

A. That depended on our contract.

Q. What do you mean by that? How could it vary?

A. When we were receiving 45 cents of a rebate, that represented in part, the profit. I mean the profit was a part of that 45 cents. We sold coal at a loss when we would bill it at a \$1.80 rate, if you would take the sale of the coal itself, without the freight being considered. Hence, the remittance for the coal wouldn't be necessarily the price of coal and 45 cents. The receiver of that coal knew we were getting an allowance out of that freight, and the price was fixed accordingly in the contract price of sale.

Q. What does the statement in your hand show was the net rate paid by you on that coal to Albany in that month?

A. \$1.35.

Q. Now, wasn't that the rate that you paid?

A. Ultimately; yes.

By Mr. NEWLIN:

Q. That was Albany.

A. Yes.

By Mr. GOWEN:

Q. I will ask you if you have any explanation of the testimony which you have given so far in this case, commencing at page 122, where your counsel asked you to read a press copy of a letter showing the rates at which shipments of the Berwind-White Company, made in 1898, had been adjusted, and he then asked you these questions and you replied as follows: "Q. Now, if those rates in Searles' letter are net rates to Berwind, White & Co. just compare them with the rate the plaintiff paid on the shipments in the same period to the same places. A. Albany, Berwind, White &

496 Co. rate \$1.35. Q. What did you pay? A. \$1.80. Q. As against how much charged the Berwind-White Company?

A. \$1.35. Q. That made a difference between the same points, at the same time, between the Berwind-White Company and the International of 45 cents a ton. Is that so? A. That is the difference between the tariff rate and the rate— Q. Specified in the letter. A. Specified in the letter. Q. Now, take another point. A. Long Island City. Q. What did you pay? A. The tariff rate. \$1.85. Q. What was charged under this adjustment to the Berwind-White? A. \$1.10. Q. That made a difference of how much

against you? A. 75 cents." Now, turn to that Long Island shipment made in the month of November, 1898, and tell us what you paid. You said here you paid \$1.85. What, in fact, did you pay?

A. Ultimately paid \$1.10.

Q. Then, was there any difference between the rate paid by you and that paid by Berwind, White & Co.?

A. Not at all in that period, to any point.

Q. Then, all the testimony you gave the other day, in which you referred to a difference of rates in that period, was incorrect?

A. No, sir. I guess not.

Q. Then, what have you to say about it?

A. I was asked what we paid. You asked me what we paid to Albany.

Q. No; your counsel asked you.

A. And I told you the tariff rate. That is what I was answering him.

Q. You thought that was a full and true answer, although you knew, in point of fact—

A. It was an answer to his question.

Q. Let me ask you this: Now, this is the question your counsel put to you: "Q. Now take another point. A. Long Island City.

Q. What did you pay? A. The tariff rate, \$1.85. Q. What was charged under this adjustment to Berwind-White? A. \$1.10. Q. That made a difference of how much against you? A. 75 cents."

Now, do you think that was a frank answer?

497 A. Well, under the examination of the books I found that the same amount was allowed to us in the transmittal letter to us, for the same period.

Q. You knew it?

A. I wasn't asked for anything about that. That was for you to prove.

Q. That is your theory of the duty of a witness, is it?

A. Well, I was answering the question.

Q. What explanation have you got to make of the fact that it turns out as the result of this examination that you have included in your statement some thousands of tons of shipments to South Amboy which weren't made?

A. It is a clerical error. I don't know whether it occurred in my taking it off the books to furnish it to my counsel or whether it is a typographical error. It is there, and the printing of the schedule was gone and transferring it from that, the book from which you are reading, Schedule A. I never checked that tonnage in the bill of particulars against our books or against my first drawing off of that tonnage. It was certainly intended that it should be an accurate statement. I took great care with it and did the best I could to have it exactly correct, and I am not satisfied yet how much an error should have crept in. It may be that the tonnage belongs to us yet. I do recall that some of our shipments were in separate sheets of paper that for a time were under the cover of the shipment book and were slow in being transcribed into that book, and this makes me think now that they never were and that those

loose sheets got astray, were separated from that book and finally lost. It was an error, and it was an unintentional error, I assure you. There could have been nothing gained by swelling it, because it would be checked by the Freight Department, every pound of it, and if there was an error, it would be as in a monthly statement for correction of rebates, as was our custom of accepting always the corrected statement of the Coal Freight Department.

498 Q. These errors that you speak of occurred in years subsequent to 1898, did they not, when you were rendering those statements to us?

A. Which errors do you mean?

Q. In computing your tonnage.

A. In the bill of particulars?

Q. Yes.

A. I don't know. I asked Mr. Rickey, while we were examining, where it was, and he said he thought it was in the Amboy for a period, which I now couldn't recall which period it was. But we made such careful search, that I was entirely satisfied with his figures.

Q. There is one other matter I want to direct your attention to, so as to afford you an opportunity to make any explanation which can be made. You have testified (page 58) in this case, as follows, with reference to an interview that you had with Mr. Searles, in reference to the adjustment of rates made on account of shipments on unexpired or unfilled contracts: Your counsel asked you: "Now, I want to get at the statement made by you to Mr. Searles when you complained about the overlapping contracts being allowed to other people and refused to you, when the freight rebates claimed were 45 cents a ton and when you claimed to get back 45 cents. Did you ever claim that? A. Yes. Q. And that was after April, 1899. A. 1899. Q. And you were refused the payment. They refused to pay you back the 45 cents. A. Yes. Q. And Mr. Searles did admit, did he not, that others having overlapping contracts were being allowed the 45 cents rebate because the contracts were still unfilled. A. Yes. Q. He admitted that, himself. A. Yes. Q. And that was the bone of contention between you and him at the time after April, 1899. A. Yes." Now, what explanation have you of the fact that in the statement of claim which you filed in this case, to the correctness and accuracy of which you swore, it is averred, on page 17, as follows: "The plaintiff further avers that from time to time during the entire

499 period covered by the shipments mentioned in Schedule A the defendant's agent, with the successful intention of deceiving the plaintiff, did constantly represent to the plaintiff that no shippers were allowed to make overlapping contracts, and that no shippers were allowed to have any different rates, from the beginning of a new fiscal year, on April 1st, from the rate charged, or to be charged, to the plaintiff for similar shipments. And the plaintiff further avers that it discovered in November, 1904, on the trial of a suit brought by the plaintiff against this same defendant,

in the Court of Common Pleas No. 2, of Philadelphia County, to March Term, 1901, No. 332, that the defendant had been in the habit of allowing certain shippers to make overlapping contracts; and that upon the false pretense of its being necessary to protect the shippers and consignees under these overlapping contracts from change in the rate of transportation, the defendant granted these shippers, or their consignees, rebates varying from 15 to 45 cents," and so on. Now, what I want to ask you is—because I intend to comment upon that—how you reconcile the statement made in your statement of claim, that you discovered that condition in November, 1904, with the testimony which you have given in this case, that after April, 1899, you had this conversation with Mr. Searles, in which Mr. Searles told you he was making these—

A. Always on the approach of the 1st of April, there was caution thrown out by conversations in the Coal Freight Agent's office that that was the time for a new tariff, and it was understood that all rates would be off; nothing would be carried over. We wouldn't have thought of entering into a contract, except in the very small business of bunkering tramp steamships, that would run past the 1st of April, because that could not be controlled in that the ships were owned by foreigners and they had their own arbitrary dates. That was a very subordinate and peculiar kind of business. But

500 with all other business the understanding always was a particular warning if the rates were to be advanced; at the time they were advanced there was particular mention made of that, and we were offered at that time the opportunity of filing contracts to protect them, which I wasn't able now to recall whether it was before or after the 1st of April. What is the earliest date he knew of protected contracts under the bill?

Q. I am asking you—I don't know whether you understand my question—to give any explanation which you can which will reconcile your testimony of a few days ago, to the effect that after April, 1899, you had this conversation with Mr. Searles, at which he admitted, you say, that these adjustments were being made on account of coal shipped under unfilled contracts, with the statement embodied in your statement of claim in this case, to which you swore, that you didn't discover until the trial of the case in the Court of Common Pleas No. 2 in 1904, that it had been the practice of the Railroad Company to make adjustments on account of coal shipped under unfilled contracts.

A. I think what I must have meant to say there was it became a public matter at the time of the trial, that that was the case.

Q. Wasn't that statement put in your statement of claim for the purpose of endeavoring to relieve you from the bar of the statute of limitations?

A. No, sir.

Q. It wasn't?

A. No, sir; hadn't thought of that in connection with it, at all.

Q. You have given all the explanation about this that occurs to you?

A. Yes; as far as I understood what is referred to.

Q. You just mentioned the fact that you were asked to furnish evidence of any contracts which you had in April, 1899, under which shipments remained to be made. You weren't, as a matter of fact, asked to furnish that.

501 A. Not exactly. We were asked to furnish contracts made for shipments unfilled.

Q. The purpose of the Railroad Company in asking for those contracts, you were advised, was in order that the rate in force during the previous year might be applied to shipments under those contracts?

A. Yes, sir; that is right.

Q. And you had done that?

A. We hadn't any in the shape of contracts. We had what we considered were equivalent to it, and what I have always believed were equivalent to some of the contracts that people did supply to the Coal Freight Agent afterwards.

Q. What did you have that you considered equivalent to the contracts?

A. A running business that was for about all of a certain quality of coal that we could ship—all we could spare—for the customers continuously.

Q. That was the character of it.

A. And we operated under that sort of agreement, not being a contract in writing for a given amount within a given period, but it was a continuous business that remained with us for all we could spare of a certain quality of coal.

Q. Now, did you have what you have called contracts for bunker coal, which overran the 1st of April?

A. Yes; over from England, dated with the calendar year, as a rule.

Q. And in case of the contracts of that sort which you had, the railroad company continued to apply the lower rate in force prior to April 1, after the rate had been advanced, did it not?

A. That never came in question. There was no advance of rates during the time we had such contracts, and we had no such contracts during the period of this suit.

Q. You are acquainted with the handwriting of Mr. Lambirth, the president of your company?

A. Yes, sir.

502 Q. Is that his signature (handing paper to witness)?

A. Yes, sir. From seeing those papers, I wish to correct a part of my last statement.

By Mr. NEWLIN:

Q. Go on.

A. I had forgotten that there were any contracts for steamship bunkering after May, 1896, I think it was.

By Mr. GOWEN:

Q. In point of fact, you did have these bunkering contracts over-

running the 1st of April, on which you secured the rates in force at the time the contracts were made?

(Objected to by plaintiff unless it is confined to interstate shipments.)

A. I want to see the contracts.

(Papers handed to witness.)

The WITNESS: New York harbor is included in the contracts. I am not able to say now whether we did or we did not bunker a steamship under those contracts. Sometimes we would have contracts and the ship wouldn't get here in two or three years. Tramp steamers went the whole world around and they were always a surprise wherever they landed for business. I am not so sure we furnished any coal. It wasn't in my mind that we had any shipments of that character after May, 1896.

By Mr. GOWEN:

Q. What is the date of this (showing paper to witness)?

A. That is May 10, 1900.

Q. To whom is the letter addressed?

A. J. G. Searles, Pennsylvania Railroad.

Q. Read it.

503 A. "Enclosed please find copies of contracts I made last year running through this year, on steamship business. These contracts were all taken, based upon the rate of freight given us of 85 cents a ton to Greenwich and \$1.15 to South Amboy. We send you these contracts as per your request to our Mr. Wilson yesterday. Respectfully yours, Henry W. Lambirth, President."

Redirect examination.

By Mr. NEWLIN:

Q. The initial points of all your shipments in Schedule A—that is, the plaintiff's statement—were within what is known as the Clearfield region in Pennsylvania.

A. Yes, sir.

Q. That is the way of designating the general region that is referred to in these Searles letters of transmittal. It is stated to be the Clearfield region as to all these shippers?

A. We examined nothing else.

Q. And subject to the correction as to the amount as to which you have testified, the shipments were all made to the points of destination named in Schedule A?

A. Yes.

Q. Taking up the matter of the Huntingdon & Broad Top, they were in the Clearfield region?

A. Yes; under the tariff rates.

Q. And your dealing as to freight was entirely with the Pennsylvania Railroad, that is to say, the Pennsylvania Railroad fixed a rate which covered the movement on the Huntingdon & Broad Top?

A. Yes.

Q. So that it was one transaction, without regard to the starting point, and that was in the Clearfield region—one transaction, from start to finish, delivery point, with the Pennsylvania Railroad?

A. Yes.

504 Q. And that applies to all the shipments in the schedule—all that you are suing on?

A. Yes.

Q. And is it not a fact that the freight, except in probably some few instances—that the freight in practically all cases followed the coal and was collected from your consignee on your account, on the price delivered?

A. Yes.

Q. That was the way you sold, wasn't it?

A. Yes.

Q. So that all the sales were at a delivered price, the freight being a lien on that coal and following it, and was paid by the shipper for your account, and the balance remitted?

A. Yes.

Q. That applies to the whole of it?

A. Yes, sir.

Q. Now, there was something said about some coal purchased from you for Berwind, White & Co. But is that coal that they purchased from you at the mines—I understood it was at the mine, or was it at the delivery point?

A. Some of it was at the mines and some at the delivery point, they taking care of the freight.

Q. Do any of those sales to Berwind, White & Co. figure in Schedule A? Is that coal in Schedule A?

A. Yes; in the long period. I can say yes as to embracing it all. I am not now aware of the date.

Q. I don't mean whether the period of time covers it, but whether in Schedule A you have asked for an additional allowance or deduction on any of the coal you sold to Berwind, White & Co. at the mines?

A. No; that would not be included.

Q. Now, in regard to these various companies concerning which Mr. Gowen has asked you whether they were coal-mining—and they were, most of them—were all of them companies that purchased coal as well as mined it—the companies he mentioned in your cross-examination?

A. Yes; they are buyers as well as miners.

Q. So they were all buyers, as well as miners—the companies you have just referred to in your cross-examination this afternoon?

A. Yes. I would like your question repeated in reference to our selling to Berwind-White. You asked in particular about the Berwind-White purchases.

Q. I asked you as to some purchases that had been made by Berwind, White & Co. from the International, and made at the mines?

A. Whether they were in Schedule A?

Q. You said they were not in Schedule A?

A. Yes; I said they would not be, and yet when I come to think of it—

Q. Can you point to any in Schedule A, that may be in it, of that character?

A. I don't think there were sales during the period, as it has been reduced by the statute of limitations.

Q. That is what I mean. Is there any coal in the period of time from July 29, 1898, to the end, in the shipments on which the claim is now proceeding—are there included in those shipments any coal sold by your Company to Berwind, White & Co. at the mines?

A. There wouldn't be any sales to Berwind-White included in that because they were sold at Greenwich, or at an earlier period sold at Bens Creek at a mine price.

Q. Then they do not figure in that portion of Schedule A that is now in litigation?

A. No.

Q. And in all these shipments the freight was eventually paid, and there is no question as to claim in Schedule A, as reduced according to amount and also according to time—there is no contention that any of the freight is still due the railroad. They were paid?

506

A. I presume so.

Q. You never heard of any claim?

A. No.

Q. And the consignee couldn't get the coal without paying the freight, could he?

A. No; either the money or bond to pay it within a week, or something of that kind.

Q. So, as far as the freight was concerned, from start to finish, whether carried on the line of the Pennsylvania Railroad or connecting points, the whole transaction as to freight was with the Pennsylvania Railroad Company?

A. Yes, sir.

Q. Where reference was made by Mr. Gowen to the adjusted rate for Harsimus being 40 cents, and for South Amboy five cents more, whilst it was nominally five cents more, this question of what it cost Berwind, White & Co. for boat freights does not enter into what appears in the Searles letters. That is a thing to be demonstrated outside. There is nothing on the face of the Searles letters that are brought in under this order, to show what it cost Berwind, White & Co. for boat freights?

A. No; but letters were in the transmittal letter books in part of the period, allowing for the 40 cents.

Q. Exactly. But the question whether Berwind, White & Co. having had allowed to them 40 cents for boat freights from Harsimus pier, that little distance with the steamer—whether that was too much or too little, whether it was a discrimination against your company or not, does not figure in any way in the schedules and tables produced by the Audit Company?

A. No.

Q. But you have testified that in your opinion, from a knowledge

of the business and what was done, 5 cents a ton was a reasonable rate to allow for the movement of coal by boat from Harsimus pier, the end of the pier, to the point of delivery, to nearby steamships?

507 A. I said in a large business it might cost as little as five cents a ton to do it.

Q. I understood you to say that if there was nothing to come back to you, the price delivered, with the freight taken out, would have left you no profit at all?

A. The tariff rate.

Q. The full tariff rate.

A. The full public tariff would have left us less than cost.

Q. So that being paid the full tariff rate, the readjustment got back part of it and covered all your profit?

A. Yes, sir.

Q. Covered the difference between what would have been a loss and the profit; added together, it made the difference?

A. Yes, sir.

Q. When you were reading off some of those letters with reference to the audits, showing the amount charged to you, what they actually paid, though you got some of it back, you answered the question just as put to you by letter, in which you stated what you got back, and you were told in all cases, therefore, to state what was paid back?

A. I don't recall that very distinctly. I didn't answer the questions as they were asked by counsel on the other side. Notice the difference in my answer. It was that that was the difference between the tariff and the net.

Q. And that was what it was?

Recross-examination.

By Mr. GOWEN:

Q. You stated in answer to a question put by Mr. Newlin that the Pennsylvania Railroad Company controlled and issued rates over the Huntingdon & Broad Top. Now, don't you know, as a matter of fact, that those rates were shown by a tariff to which both of those companies were parties—a joint tariff?

508 A. That heading of the claim, where the freight rate is given from the Clearfield region to Philadelphia, or any point, is the same thing, and in that heading is Broad Top Railroad and other points in the Clearfield region. I never observed any difference as to Broad Top quotations.

Q. You know as a matter of fact that the Huntingdon & Broad Top Railroad is a separate organization, operated by its own officers, do you not?

A. I have always thought so.

Q. Don't you know, as a matter of fact, that it is?

A. Yes; but we didn't know it in the freight rates. We didn't ask them for freight rates; we never obtained any freight rates from them. There was no difference in getting a freight rate on Broad Top shipments from a Sonman or Clearfield county shipment.

Q. It was known the Pennsylvania Railroad and Huntingdon & Broad Top Railroad had, in effect, joint rates—through rates?

A. That wasn't a matter exposed to the public, nor to me.

Q. I would like to know just how certain you are that this coal which you say you sold to the Berwind-White Company at the mines, is not embraced in the statement of shipments which are in this case, made subsequent to April, 1898?

A. Well, the purchase of Sonman coal was at an earlier time—I know that—than this 1898; but I am not so sure that some small purchases of coal at Greenwich was in this period.

By Mr. NEWLIN:

Q. Never mind the purchases of coal at Greenwich.

A. I was only thinking of the purchases of coal purchased from us.

By Mr. GOWEN:

Q. There was one matter I forgot to ask you about. You stated in your examination-in-chief, in answer to a question of your
509 counsel, that there were no facilities existed for storing coal at South Amboy. Do you not know that during the period covered by this action you were allowed to store coal in the cars without demurrage?

A. I overlooked the fact. He was speaking of boat storage in Harsimus coal. At least that was in my mind that the question went that way. After the discharge from the cars, the storage facilities were similar to the storage facilities at Harsimus Cove—in boats.

Q. Then, in point of fact, you got your coal stored in the cars at South Amboy during this period?

A. Yes; a reasonable time.

Q. What was a reasonable time?

A. It varied. During our period it wasn't very exacting as to time if we showed we had business and boats were sure to come for it.

By the COURT:

Q. How long was it—a day or a week?

A. Sometimes it would require a week to accumulate for a boat load. A few scattered cars might head the movement and other cars making up enough of the required amount for the cargo would be slower coming in, would be sidetracked or snowbound, and they would be allowed to lie over until enough was accumulated for us to take the required amount for a boat.

By Mr. GOWEN:

Q. Wasn't the time practically unlimited for free storage?

A. During a period of my experience in the coal business, it was. I am not so sure about this period. There was great liberty in that in former years.

WILLIAM J. FOX, called by plaintiff, sworn.

By Mr. NEWLIN:

- Q. What is your full name?
510 A. William J. Fox.
- Q. What business are you in?
A. Miner of soft coal; bituminous coal.
Q. Have you an individual business or company?
A. Company business.
Q. What is the name of the company?
A. Logan Coal Company.
Q. Is your business from the Clearfield region in Pennsylvania?
A. Cambria county.
Q. But that is part of what is known as the Clearfield region?
A. It is Central Pennsylvania district; yes.
Q. But I mean in the trade and with the railroad company?
A. It takes the same rate as the Clearfield region, if that is what you mean.
Q. It takes the same rate as the Clearfield region to points such as South Amboy?
A. All points.
Q. And all points?
A. Yes.
Q. How long have you been in this business?
A. About fifteen years.
Q. Have you had any shipments between the Clearfield region and this region you have just described now as having the same freight rate, and South Amboy?
A. I have; yes.
Q. And other points in New York, New Jersey and New England?
A. We have been shipping to those points; yes.
Q. And you still have that business?
A. Yes.
Q. In the period between July 29, 1898, and April 1, 1901, you were in that business?
A. Let me emphasize this point. As the Logan Coal Company we weren't in business until 1900.
- 511 Q. You were in the coal business during that period?
A. As a broker and shipper; not a miner.
- Q. And you were familiar with the trade at that time?
A. Yes.
Q. And you were familiar with what was commonly known of the situation of the Berwind-White Coal Mining Company as to Harsimus pier? You knew that as a matter of common knowledge?
A. I knew they controlled piers; yes.
Q. You couldn't ship coal to Harsimus during that period?
A. I never tried. I don't know as to whether I could, or not.
Q. You knew from your general knowledge of the coal business that it couldn't be done?
A. I had that impression.

Q. And that was the general knowledge of the trade. It was common knowledge?

A. I wouldn't want to say that, for I don't know about what my competitors thought about it or said. I never tried to go to Harsimus Cove.

Q. You never tried to get coal to Harsimus pier because you thought you couldn't do it?

A. Sure.

Q. From what general knowledge you had of the coal trade at the time. Very well. Now, were you allowed to make overlapping contracts, overlapping the freight year?

A. I never asked for that.

Q. You never did it, in point of fact?

A. I never did it; never asked to make an overlapping contract.

Q. You know, do you not, in a general way, the geographical situation of South Amboy and Harsimus pier?

A. I do, yes.

Q. And you know their relative relations to points of delivery, such as the steamships and other purchasers of large amounts in New York harbor? You know that in a general way?

A. Yes, I do.

Q. Now, I want to know if Berwind, White & Co. were allowed to make continuous contracts, for instance, with the steamship companies, running over a period of years, which contracts were protected against an increase in freight rates, and if they were also allowed the use of that pier exclusively, and if their trains were expedited and their coal trains were sent in solid trains, without waiting, without stopping, what, in your opinion, was the commercial advantage to Berwind, White & Co. over their shippers, in having those facilities? What was it worth?

(Objected to by defendant. Objection sustained. Exception to plaintiff.)

Q. Referring to the matter of the privilege of making overlapping contracts which would be protected from a freight increase during their continuance, and which contracts might go on for an indefinite period, from your knowledge of the coal trade, what could fairly be said to be the commercial value of such a privilege for the person who had it at the expense of other shippers in like circumstances?

(Objected to by defendant. Objection overruled. Exception to defendant.)

A. It is a hard question to answer. The only way I can answer that question is to say it is a matter when those contracts were made what rates were in force and when the rates were changed. It would simply cover the difference between the rates which were charged during the latter part of the period in which this coal was delivered and the rates charged at the time the contracts were made. Of course, I can't tell that.

Q. What I want to get at is: In addition to the privilege
513 of getting back the money, I want to know what that commercial privilege was worth to the person who had it, irrespective of actually getting it back, in getting customers and in getting trade?

A. I couldn't answer that question; that is a theory, not a fact.

Q. I will put it another way. You were in the same business at the same time, and between the same points, as the plaintiff shippers. That you have testified to. What would it have been worth to you as a commercial advantage in that same period of time, to have been enabled to make such overlapping contracts?

A. Well, if I had known there was going to be a change in the rates, it would have been a whole lot to me. I would have been smart enough to make contracts for ten years; and then I might have been caught in some other feature.

Q. Take your actual trade at the time between the same points. Could you have got a greater profit out of the coal that you sold, than you did get, if you had been allowed to contract on the basis of the overlapping contracts—could you have made better terms?

A. No, I can't say that I could; because rates might have dropped, and it depends on the other side.

(No cross-examination.)

FREDERICK ALBERT VON BOYNEBURGH, called by plaintiff, affirmed.

By Mr. NEWLIN:

Q. What is your business?

A. Miner and shipper of bituminous coal.

Q. Your business has been in the Clearfield region of Pennsylvania?

A. Yes, sir.

Q. Has it been between that point and South Amboy and New York and New England and New Jersey?

514 A. Yes, sir.

Q. And was that your business between the 29th of July, 1898, and the 1st of April, 1901?

A. Yes, sir.

Q. Were you with a company or individual?

A. I represented Reakirt Brothers & Co.

Q. And they were in business in a large way, were they not?

A. Yes.

Q. They did a large business?

A. Yes.

Q. Did you at that time have for them, or did they have, overlapping contracts; that is to say, overlapping the 1st of April next coming?

A. I couldn't say they really had any overlapping contracts.

Q. You know what they mean. You know it is a contract that extends beyond the next succeeding freight year?

A. Yes, sir.

Q. You understand that, don't you?

A. Yes, sir.

Q. You understand what such a contract means?

A. An overlapping contract?

Q. Yes.

A. Yes, sir.

Q. What do you understand it to mean?

A. I understand it is extended after the first of April of each year.

Q. And you had no such contract. Now, I want to know in the period mentioned, between July 29, 1898, and the 1st of April, 1901, what is a fair estimate of the commercial advantage to a shipper of coal to be told to make such overlapping contracts, protected against a freight increase, over shippers who had not the same privilege?

(Objected to by defendant. Objection overruled. Exception to defendant.)

A. From 1898 to 1901?

515 Q. From July 29, 1898, to April 1, 1901?

A. Well, that would be a pretty hard proposition, to decide that, unless you knew the tonnage you refer to.

Q. Well, on a considerable tonnage?

A. Well, considerable doesn't give me the amount. Do you mean a million tons or two million tons?

Q. No; very much smaller than that.

A. Well, if it run till that time and you could hold that trade, it would be worth considerable money.

Q. Now, suppose these contracts would run for a period of years, so that you could guarantee the people——

The COURT: We cannot go into that.

By Mr. NEWLIN:

Q. In such a case as that I have been describing what would be a reasonable estimate of the commercial advantage to the shipper? Take, for instance, the Berwind-White Company; what was it worth to them in that period of time, in your opinion, to have the right to make the overlapping contracts for a series of years, protected against freight increase, in getting business?

A. Do you mean as to the total tonnage?

Q. Take their tonnage as far as you know it.

A. I mean as to the total tonnage or half tonnage?

Q. I mean take what you commonly know, with your knowledge of the coal business, of the large tonnage, in the sense of the Berwind-White Company's; what was it worth to them to have such a privilege?

A. I would think if it was for half tonnage, it would be worth 50 to 60 cents a ton.

Q. That is to say, a shipper who had even half the tonnage that the Berwind-White Company had, would find it worth, commercially, 50 to 60 cents a ton to have that advantage?

A. Yes.

516 Cross-examination.

By Mr. GOWEN:

Q. The plaintiff in this case has shown shipments of about from 20 to 30 thousand tons a year. Can you see any particular advantage that would have accrued to the plaintiff, having that tonnage to ship, from entering into contracts extending over a period of a year?

(Objected to by plaintiff. Objection overruled. Exception to plaintiff.)

A. I would consider that half of that tonnage would be worth 50 or 60 cents a ton.

Q. What would make up the elements of the 50 or 60 cents a ton?

A. My idea is this: In a mining way, if you ship half your tonnage at cost the other half you should make your profit on.

Q. But the plaintiff wasn't a miner. How does that affect your conclusion?

A. If he isn't a miner, I can't answer the question. I am only answering in a mining way.

Redirect examination.

By Mr. NEWLIN:

Q. In regard to a person who purchases coal and sells again, would there not be an advantage to him in getting regular customers on long-term contracts extending beyond the freight years and protecting him against increase in freight rates? That would be a commercial advantage to that shipper, wouldn't it?

A. Yes; if he was a miner and shipper, but not if he was a commission man or a purchaser only.

Q. But if he was a purchaser and then himself sold to others, couldn't he have got a better trade by having such a right to make these overlapping contracts, and couldn't he have got a better
517 price for his coal with a protection against an increased freight rate?

A. I don't know of a purchaser making a contract with a railroad company for shipments of coal.

Q. That isn't the point. The point is: A man being in business buying and then selling coal, and being forbidden to make overlapping contracts, does sell coal with certain results. Now then, wouldn't it be a commercial advantage to have some man to be able to say to his customer, "I will furnish you coal for a fixed rate, not merely to the 1st of next April, but for five years, without any risk of an increase in freight rates." Wouldn't that be a commercial advantage to that shipper, though he simply purchased coal to deliver to others?

A. That would be a commercial advantage to the shipper, provided he had a contract. That would be a commercial advantage to a shipper if he had a contract.

Q. I am supposing a case that he was allowed to make contracts. Wouldn't such contracts be made under greatly advantageous circumstances, such as would control the price he would get from shippers in following up the trade and serving it and be of greater advantage than if he had to stop each contract in the following April?

A. It would be an advantage if he had a contract.

Q. You said the advantage would be 50 or 60 cents, speaking of miners. Now, what would be the advantage you are speaking of now in regard to a person who is not a miner, but who was in a condition to have the coal and to get customers and make deliveries—what would be the commercial advantage to him?

A. The commercial advantage would be equal.

Q. So far as his business extended, it would be just as much to him per ton, of commercial advantage, as it would be to a larger shipper?

A. That is right.

Q. So you still say 50 or 60 cents as to that?

518 Recross-examination.

By Mr. GOWEN:

Q. Take the case of a commission man. Do you think it would have been to the interest of that commission man to have entered into a contract to deliver coal, extending over a period of years, when he was confronted with the possibility that he might have to pay in the following year, or in the second succeeding year, more for his coal than he sold it at?

(Objected to by plaintiff. Objection overruled. Exception to plaintiff.)

A. If the commission man made a contract with a miner and shipper the miner and shipper would be responsible to him to carry out that contract.

Q. Then, your idea is that it would only be an advantage in case the commission man had a contract with a miner, which would insure him a supply of coal at a fixed price.

A. Yes; that is the idea.

Q. Taking the conditions in the coal trade as they existed in 1899 and 1900, how do you figure out a profit of 50 cents a ton to one who had sold coal in 1898 and had made an arrangement, we will assume, under which he was to make deliveries in 1899 and pay only the same rate of freight as ruled in 1898?

A. Well, he would have to figure on his mining expense and—

Q. We are excluding the case of a miner, and we are dealing with a commission man.

A. Well, the commission man would have to deal with a miner, or else he wouldn't get the coal, if he didn't own the mine.

(Adjourned till tomorrow, Wednesday, May 20, 1908, at 10 o'clock a. m.)

519 F. A. VON BOYNEBURGH, recalled.

(Cross-examination continued.)

By Mr. GOWEN:

Q. Did you say yesterday that you considered that the ability of the commission man to sell during any one year under some arrangement or assurance which would secure him the benefit through succeeding years of the rate of freight current at the time of the sale, would be worth fifty cents a ton to him?

A. No; I mean to the shipper, the miner.

Q. Suppose the commission man was the shipper, would it be worth fifty cents a ton to a commission man?

A. That would depend upon the arrangement made between the shipper and the commission man.

Q. Suppose the commission man had entered into a contract with the miner in 1898, by which he was assured of a certain amount of coal during the years 1899 and 1900, will you please explain how, if you were that commission man, you in 1898 could have got fifty cents a ton more for the coal delivered in 1899 and 1900 than you otherwise would have got?

A. That would be a very hard proposition to explain. It would simply be the arrangement that is made between the two parties, according to what contract they might have. Not knowing what their contract or arrangement is, is the reason I could not answer.

Q. I am not speaking of the contract between the commission man and the miner. I am asking you to explain how the commission man or how the miner, leaving out the commission man, if you please, could have got fifty cents a ton more for coal for which he sold in 1898, which was to be deliverable in 1898, 1899 and 1900, because of the fact that he had received some assurance that even if rates were advanced he would have had applied to that coal the rates current at the time the sale was made. How could he
520 have induced a purchaser in 1898 to pay him fifty cents a ton more for the coal under those conditions?

A. Not knowing what the contract was, or the arrangement between the railroad company and the shipper, it would be a hard thing for me to answer that question.

Q. Assume that this seller had received the assurance from the railroad company that if any advance was made in rate of freight in 1899 and 1900, that advance would not be applied to coal which he would ship under the contract made in 1898. Assuming that to be a fact, for the purposes of the question, how could that man have got from any purchaser in 1898 a price fifty cents in advance of the market price?

A. That would also depend upon the condition of the market.

Q. If there was other coal offering, would he have got an addition of fifty cents a ton under those conditions?

A. You mean the commission man?

Q. Yes.

A. No, I do not think the commission man would have got an advance of fifty cents a ton, but the shipper would get that advantage.

Re-redirect examination.

By Mr. NEWLIN:

Q. There is a confusion about commission men. The inter-man and all that has been said on that subject has nothing to do with these shipments. What I want to ask you is this. Is there not inherent in the mere right to make an overlapping contract a commercial advantage?

A. Most assuredly.

Q. That advantage was inherent in the right itself to make such a contract?

A. Yes, sir; that would be an advantage; most assuredly.

521 Q. Take the case of a person who is allowed by a railroad company to make overlapping contracts, running for a period of years, with absolute protection against increased freight rates, that privilege has a commercial value in itself, I understand your testimony to be, of from fifty to sixty cents a ton?

A. Yes, sir; that is the way I would see it, to the shipper or miner.

Q. Fifty or sixty cents a ton, that is the way you would put it?

A. Yes, sir.

Q. Take the case of the Berwind-White Company. You know in a general way about that line of business and about the magnitude of their business in respect to other people. Take such a concern as the Berwind-White Company. If they had a right to make overlapping contracts with protection against freight increase, to run over a period of years, what was that commercial benefit to the Berwind-White Company in those circumstances? Was it equal to fifty or sixty cents a ton?

A. That would all depend on the general management of their mines and their general business, as to the advantage that would accrue to them. That is the reason why I said that a shipper, a miner as I term it, that would be that advantage to him, say of fifty or sixty cents a ton, while it would not be to a commission man because he could manage his affairs so as to get the advantage out of that in future transactions.

Q. Then take the Berwind-White Company. They were in just the condition you have described. They could have made that advantage, could they not, in your opinion, from fifty to sixty cents a ton?

A. I think they should make a very good advantage if they had those privileges.

Q. Now take the case of any person to whom the railroad company said, "We will let you make overlapping contracts and give you absolute protection for a term of years against freight increase." Would not that be a privilege of great commercial value to him, which he could reap the profit from by going and arranging with any responsible person to furnish him the coal to sell to others?

A. Most assuredly.

Q. In regard to boat freights in this New York harbor. What

would be a fair price for boat freights from the end of Harsimus pier in New York harbor to the steamships nearby, for the delivery of coal? How much a ton would be a fair charge?

A. About fifteen cents.

Q. You do not know of any cases of that kind from Harsimus pier? That work was done by the Berwind-White Company themselves?

A. They have their own barges.

Q. Your calculation of fifteen cents then is not based on the end of Harsimus pier to the steamships but from other nearby points?

A. Yes sir.

Q. What do you know about the volume of steamship coal trade in New York harbor, whether the bulk of it or nearly all of it at that period of time was in the hands of the Berwind-White Company?

A. They are generally supposed to be the largest people in the trade.

Q. Do you know outside of the Berwind-White Company, in that period of time, of anyone who was doing business of any amount with any of the steamship lines in New York harbor for steamship coal?

A. Yes, sir; there were some few outsiders.

Q. Doing business with the large companies?

A. Not with the largest companies.

Q. I am speaking now of the great trans-Atlantic steamship lines. Were not their purchases in that period of time all from the Berwind-White Company, from your general knowledge of the trade?

A. Yes, principally so.

Q. What would have been the effect on the Berwind-
523 White monopoly in steamship coal in New York harbor if Harsimus pier had been taken away from them and the right to make overlapping contracts had been taken away from them?

A. It would put them in rather an awkward position.

Q. Would it not have put them in an entirely different position as to the rest of the trade, from what they occupied then by reason of those advantages?

A. I think it would.

Q. Would it not have thrown open the market for the great steamship lines, for coal, to all shippers, instead of being confined to the Berwind-White Company?

A. To some extent it might.

Q. I mean if other shippers could have used Harsimus pier and nobody could make overlapping contracts and the whole thing was thrown open?

A. That would be such a great advantage that I do not know that that is really a fact.

Q. But that would be a great advantage to the other shippers, but you do not know whether it is true or not?

A. Yes, sir; that would be a great advantage.

E. J. BERWIND SWORN.

By Mr. NEWLIN:

Q. You are president of the Berwind-White Coal Mining Company?

A. I am.

Q. You were served with a subpoena in this case to appear here?

A. I was.

Q. That subpoena had attached to it a clause requiring you to make production of certain evidence that it specified?

A. Yes, sir.

524 Q. One call made upon you under this duces tecum clause is this: "You are required to bring with you, covering the period from April 1st, 1894, to March 18th, 1901, all books of accounts, letters, papers, and other documents, concerning claims made by the Berwind-White Coal Mining Company upon the Pennsylvania Company for payments or repayments on account of shipments of coal made by the said company by way of the Pennsylvania Railroad Company from any points in what is known in the coal trade as the Clearfield region of Pennsylvania to Greenwich pier, Philadelphia, and elsewhere for shipment to any point outside of the State of Pennsylvania mentioned in the schedule on pages 6 and 7 hereof, and showing moneys paid or repaid at any time by the said Pennsylvania Railroad Company on account of any such shipments made between April 1st, 1894, and March 18th, 1901." What did you do for the purpose of complying with that call?

A. I directed that all books of the Berwind-White Coal Mining Company, in compliance with that summons, should be in court at the order of the court, but I protest against their being used except by the order of the court.

Q. I want to know whether in that period of time, which you can now reduce and make it read from July 29th, 1898, to April 1st, 1901, the Berwind-White Company got back any money from the Pennsylvania Company on account of freight shipments?

A. I think they did, and if so it will show in these books.

Q. Before going into details, I want to know if it is not a fact that you had an allowance to Harsimus pier shipments of thirty-five cents for boat freights to deliver the coal from the end of Harsimus pier to steamships in New York harbor?

A. I had not that I am aware of, not in that form.

525 Q. State it in the way you understand it to be, because we have the Audit Company's schedules showing a reduction from the gross rate to the net rate which would make a difference of thirty-five cents from Harsimus pier covering this period, put in under the head of "Terminal Expenses." I want to know whether you got that, and whether the terminal expenses referred to mean boat freight?

A. I can explain exactly how the business is done at Harsimus. I must answer it in this way to make it clear. We built a pier at Harsimus ourselves. It does not belong to the Pennsylvania Railroad. The Pennsylvania Railroad Company—we formerly shipped at South

Amboy. Business got so large at South Amboy that the Pennsylvania Railroad, for its own convenience, asked us to center it at one point.

Q. I would rather you would answer my question.

A. It is all incidental to this.

Q. We do not want in this to go into a general history of your transactions with the railroad company. That may come later. I want to find out what money you got back and on what consideration you got it back from the Pennsylvania Railroad Company during the period named?

By the COURT:

Q. State what it was in sum total that you got back per ton, then you can explain what it was for.

A. I cannot reply to that question in figures. It would have to be shown by our accounts.

By Mr. NEWLIN:

Q. Bring your accounts and help yourself.

A. You will have to get it from the accountants. We turned everything into Philadelphia. The accounts are not kept in New York.

Q. You did get money back. We want to know what you got back beginning with July 29th, 1898. It is up to you to produce the books here and show it, and demonstrate from the books what you got back.

526 By Mr. GOWEN:

Q. Did you make any entries in those books?

A. No, sir.

Q. Where were they kept?

A. In Philadelphia.

Q. Where is your office?

A. My office is in New York.

Q. You had nothing to do with the books, or with the keeping of them?

A. Nothing whatever.

By Mr. NEWLIN:

Q. You did get money back from the Pennsylvania Railroad Company. I want to know what you got back, for instance, in August, 1898?

A. I cannot tell you without reference to those books.

Q. Refer to the books. You were directed to produce them here for that purpose. Get the books and find out. Show what money you got back from the Pennsylvania Railroad Company on account of shipments from the Clearfield region, which shipments were made during the month of August, 1898. We want to know how much per ton you got back on shipments of August, 1898.

A. Our books will not show that per ton. It is in a round amount. Our books are not kept to show it per ton.

By the COURT:

Q. Can you tell us what you paid for the transportation of your coal per ton, what rate you had?

A. Yes, sir; we can tell that. I admit all the accounts as put in by the Audit Company. The gross amounts are entered in our books and were paid in those months.

By Mr. NEWLIN:

Q. What do your books show that you paid on shipments from the Clearfield region to Harsimus pier, in August, 1898, and how much you got back?

527 A. I have just consulted my bookkeeper. He says it will not show what was paid per ton.

Q. I have not asked you what was paid per ton. I want to know what you know, and I want you to show from your books what you paid and what you got back for the month of August, 1898, on shipments of coal from the Clearfield region to Harsimus pier, the total for August, 1898.

A. The rates are the same. My bookkeeper tells me the rates are exactly the same as shown by the Audit Company.

Q. Without asking you in detail about this duces tecum matter, you did direct the getting together of books that you suppose would be in answer to this clause of the subpoena?

A. I did, subject to the order of the court.

Q. This is a call for the showing of the tonnage upon which the repayments were made, whether made directly or indirectly. Then you were called to produce the Harsimus pier lease which has been produced. Then you were asked to produce between the same period of time any evidence in your possession showing the net rates between the Clearfield region and Harsimus pier on coal shipments. Have you produced that?

A. I gave order to produce everything that was asked for.

Q. Have you made any inquiry to find out whether there has been gathered together what you directed to be gathered?

A. I gave directions to comply fully with that subpoena, to the officers of my corporation, as far as it can be complied with.

Q. You do not know whether what they gathered together does comply with it or not?

A. I do not know how far it will go.

Q. One thing was, where the cars were weighed. It is a fact, is it not, that your solid train loads of cars would come through without being weighed at all?

A. That is so.

528 The COURT: We will not go into that. We will overrule the question as to those matters that are not in the statement. As to solid train loads, that question is ruled out.

(Exception noted for plaintiff.)

Q. Had you special assignments of cars or locomotives during this period from the Pennsylvania Railroad covering shipments?

A. Not to my knowledge.

Q. Had you a right of way over the plaintiff for your coal trains on the Pennsylvania Railroad?

A. No, not to my knowledge.

Q. Did you not get back from the Pennsylvania Railroad Company 15 cents a ton on what you had paid for bringing coal to Harsimus pier during this very period?

(Objected to, because the 15 cents was paid to the Berwind-White Company for services performed by them in relief of the defendant in handling the coal over Harsimus pier. Objection overruled. Exception noted for defendant.)

Mr. NEWLIN: I now call, in connection with the examination of this witness—the testimony of Mr. Rickey was that this 15 cent business was not in any of those matters produced before him, the Searles letters of transmission, so we have nothing in regard to this 15 cents here in court, and it being admitted that the payment was made, there is a clear default in the non-production of the papers called for by the rule to produce, and I propose to ask for a default judgment on it, but as Mr. Berwind is being examined I will go on, I do not want to waive anything.

By Mr. NEWLIN:

Q. Then you did get back from the railroad company covering this period of time, 15 cents a ton for some purpose on your shipments to Harsimus pier from the Clearfield region in Pennsylvania?

529 A. We received 15 cents a ton.

Q. It was a repayment made to your company after you had paid the full freight rate?

A. For services rendered.

Mr. NEWLIN: I call this witness now on cross-examination as an adverse witness.

By Mr. NEWLIN:

Q. Are you a stockholder in the Pennsylvania Railroad Company?

A. Yes, sir.

Mr. NEWLIN: I now make a formal call under the order of April 2nd, 1907, and the rule to produce. I ask for the immediate production by the Pennsylvania Railroad Company of their books and accounts showing the payment of this 15 cents a ton to the Berwind-White Company for handling coal on Harsimus pier within the period of this litigation.

The COURT: The request for production is overruled, for the reason that Mr. Berwind, who received the money, is here, admitting that it was paid. There is no necessity for the production, and the request is therefore overruled.

Q. Did this 15 cents repaid to you cover all of the tonnage between Clearfield and Harsimus Pier in the period that I have mentioned?

A. It did. I want to explain this. Harsimus pier is not the property of the Pennsylvania Railroad, it is the property of the Berwind-White Coal Mining Company.

(Objected to by Mr. Newlin. Objection overruled. Exception noted for the plaintiff.)

By the COURT:

Q. Tell us all about it.

A. The pier was built by the Berwind-White Company upon a piece of land leased from the Pennsylvania Railroad Company. The property was built upon specifications drawn
530 by the Pennsylvania Railroad to conform with their ideas of a pier. The Pennsylvania Railroad Company delivers the coal at this pier. We provide the engines, the labor, and all the machinery necessary to take that coal and move it down to the end of our pier, and dump it into our barges, for which we receive the ordinary terminal pay, allowed to other railroad companies and to all terminal people, of fifteen cents for the same services.

MR. NEWLIN: I move to strike out that part of the answer which refers to what other people were getting for the same services, because the witness cannot have personal knowledge of what was paid to others.

(Motion overruled. Exception noted for plaintiff.)

MR. NEWLIN: Mr. Newlin states at this point that the matter is not in shape at this time to go into the question of reasonableness or unreasonableness of the 15 cents a ton, and he asks to not be prejudiced by not going on through this witness with any further consideration as to the subject.

The COURT: Of course, you will not be prejudiced.

By Mr. NEWLIN:

Q. In addition to this 15 cents at the terminal, you were allowed all through the period I have mentioned from July, 1898, to April, 1901, or your company was allowed a certain rate at the initial end as an allowance for the use of your own tracks as lateral spurs, sidings, and things of that kind, the passing of the coal over your own tracks to the Pennsylvania Railroad Company. You were allowed something for that?

A. Not to my knowledge.

Q. You do not know anything about that?

A. No, sir; I have no such knowledge.

531 Q. Did you know it was allowed to other companies, the Altoona Coal and Coke Company, for instance? You know of such a company as the Altoona Coal and Coke Company?

A. I am sorry to say I do not.

Q. You have heard of it as a shipper of coal through the Columbia Coal Company from the Clearfield region. Do you not know that that company was allowed a certain rate from about one to four miles, its tracks being used to bring coal to the Pennsylvania Railroad Company? There was a sort of prorating on the basis of the trackage of that company?

A. No, sir. I think I know what you want to get at with us now.

Q. State it then.

A. I think at that time we had not turned over to the Pennsyl-

vania Railroad Company the Scalp Level Railroad Company. I know of no other. There is no other.

Q. You mean that there is no trackage anywhere of the Berwind-White Coal Mining Company that was made the basis of an allowance to the Berwind-White by the railroad, just the same way that this 15 cents was, for services?

A. I know of no such case.

Q. You have laterals outside of this?

A. I know of none.

Q. Are all your mines directly on the line of the Pennsylvania Railroad?

A. No. They take the same rate that all mines in that zone do. Rates are fixed in a zone known as the Clearfield zone. That rate is made from there. We get no lateral off of that.

Q. You mean to say that where you have to bring your coal to the Pennsylvania Railroad a certain distance on your own track, that you get no allowance out of the Clearfield rate by reason of that service?

A. I do mean to say so, that we do not.

532 Q. You say you never have during the whole of this period?

A. We never have, to my knowledge.

Q. Did you make any inquiry?

A. Yes, sir. I would have knowledge of that naturally.

Q. You made no inquiry specially in regard to this examination?

A. I have made none, but I am very sure of my statement.

Q. No other shipper had the use of Harsimus pier?

A. No, sir.

Q. You have had it during the entire period mentioned from July, 1898, to April, 1901, and to the present time?

A. We have had the entire use of the pier.

Q. You were called upon to produce documentary evidence showing contracts by the Berwind-White Coal Mining Company, with the approval of the Pennsylvania Railroad Company, for the delivery of steamship coal or other coal extending beyond the succeeding first day of April. Have you produced those contracts?

A. I gave directions for them to be produced.

Q. I ask for them now. Where are they?

A. That can be furnished in the same way the books can be furnished.

Q. Let us have the contracts.

A. They will furnish you all the papers we have. Everything we have is at your disposal. We admit there were overlapping contracts.

Q. You admit that during all that period of time you had overlapping contracts with various customers, which extended beyond the succeeding April 1st, which was the end of the current freight year?

A. You say several, a very few. We had those contracts.

533 Q. What contracts of that kind had you that were in force, and with whom were the contracts, during the period mentioned from July, 1898, to April 1st, 1901?

A. The French Company Trans-Atlantic, The North German-Lloyd, The Hamburg-American Packet Company, and I think the New York and Cuba Steamship Company. I think that embraces all of them.

Q. Those are all lines in New York harbor?

A. They are.

Q. The steamers of those lines were to be coaled by you under those contracts?

A. Yes.

Q. It took in the whole of the business of those companies during the period of the contracts?

A. It did.

Q. When were those contracts made that were in existence in July, 1898?

A. They were made at different periods. They were made previous to that time.

Q. What period of time did those contracts cover? Were they for a term of years, or for how long?

A. They covered a term of years. They varied in expiration.

Q. Of those then in existence, what was the longest limit of the term of years?

A. I could not recall that off-hand. I think about two years or two years and a half, possibly longer or possibly shorter, speaking from memory.

Q. I call your attention to this, that in the tabulation of the Audit Company in reference to overlapping or unexpired contracts, there is a reference made to contracts that were in existence that were made before a certain date in 1898. The allowances were as late as 1901, so that it would be over two years. Having that in mind, do you not think that some of your contracts were for a period of more than two years?

A. I said I thought two years and a half. I am not sure enough to be positive.

Q. Do you recall any of them that were for a longer period than two years and a half?

534 A. No, not that I recall.

Q. As to those contracts, you reported them to the Pennsylvania Railroad Company, did you not?

A. Yes, sir; they were reported to the Pennsylvania Railroad Company, not at the time they were made.

Q. But at the time you wanted any benefit under them they were reported, so that road would see you had such contracts?

A. They satisfied themselves on that point.

Q. So that the Pennsylvania Railroad Company did know that you had the contracts that you have just testified to?

A. They knew that they were made.

Q. And they did approve or ratify them by making to your company repayments where the freight rate had been increased during the term of the contract?

A. Yes, but they did not carry it out.

Q. They recognized it to that extent?

A. They recognized it to a certain time.

Q. And to a certain amount?

A. Yes.

Q. Had you such contracts during that period of time with any other person or companies than those steamship lines?

A. No, sir; not that I recall at all.

Q. Who would know?

A. I do not think there were any.

Q. If there were other contracts of that kind, what one of your clerks would be most familiar with it?

A. When you get the accounts up they will tell you.

Q. As far as you know, who would be the man that would know most about it?

A. That would be on file here in the Philadelphia office. The treasurer would know.

Q. Mr. McOwen?

A. Mr. McOwen or Mr. Middleton.

535 Q. Mr. McOwen or Mr. Middleton would know about that?

A. I think so.

Q. You were asked to produce documentary evidence showing what money was expended by the Pennsylvania Railroad on Harsimus pier or piers, for construction or repair, and when expended, and how much thereof was repaid, if any, by the Berwind-White Coal Mining Company, and when, and whether any consideration passed from the said railroad company to the said coal company by reason of any such repayments. What is your answer to that?

A. The answer to that is that that will show in the account. It will be shown to you.

Mr. NEWLIN: I ask for the account to be produced now so I can examine the witness in regard to it covering the item of payment made to the Pennsylvania Railroad Company on Harsimus pier and repayment, and the dates.

Mr. GOWEN: We have produced in obedience to Mr. Newlin's call a lease which recites the original expenditure, and a supplemental lease which recites the subsequent expenditure.

By the COURT:

Q. Does that show all the expenditure?

A. The lease in the document which gives us the right, which makes the arrangement for the connection with the pier of the Pennsylvania Railroad, and the freight covers the entire handling of the pier. They allow us 15 cents a ton, which is the usual terminal pay not only to our company, but generally to railroads at that point for that service. We keep up all repairs on the pier, all expenses of the pier, dredging the slips, and keep it in order. The Pennsylvania Railroad contributes nothing towards it whatever.

By Mr. NEWLIN:

536 Q. You say you have it and it is here. I want to see it. I want to see just what I read, documentary evidence showing what money was expended by the Pennsylvania Railroad

Company on Harsimus pier or piers, for construction or repair, when expended, and how much thereof was repaid, if any, by the Berwind-White Company.

A. I said everything in connection with the pier is in the court room.

Q. Bring in whatever it is in regard to those payments. I want you to produce the account.

By the COURT:

Q. Were there any repayments?

A. There was a repayment I think of \$40,000 brought about in this way. The Pennsylvania Railroad Company for its own tugs and its own float service in New York required facilities for coaling them. They had their own coal and wished to put it over our pier. They asked authority from us to extend that pier to a certain distance in order to provide such coal facilities for their tugs. They expended \$40,000 to bring that about. They charged it to us, and we protested against it, because we wanted some of those facilities only, and they required the great bulk of them for their own purposes. The contest went on for several years and finally resulted in our giving them back the \$40,000 which were expended for that extension, much to my dissatisfaction.

By Mr. NEWLIN:

Q. There were other payments and repayments in addition to the \$40,000?

A. I know of none.

Q. Is that the only one that would be shown by all the books that are here?

A. As far as I know.

Q. Have you inquired from any clerk?

A. I have inquired. There are no payments. The pier belongs to us. We made those repairs.

Q. You mean you are tenants of the pier?

537 A. We are not tenants of the pier. The pier is our property. It is on their land.

Q. You built the pier on someone else's land. You say the pier is yours, as distinguished from the land?

A. From the land.

Q. Of course, at the end of the lease, the pier would go with the land?

A. The lease will show.

Q. The boat freights from Harsimus Pier, that is to say, the carriage of coal from the pier to a steamship was done with your own barges, was it not?

A. Not wholly.

Q. Was not the bulk of it done in that way?

A. A good deal.

Q. Those barges constitute part of your general plant?

A. They do. They cost us \$1,000,000 to put them there.

Q. What was the cost per ton as to those shipments that were made

through your own barges? What did it cost your company per ton to get the coal from the end of Harsimus pier to the steamships?

A. The freight on coal in New York harbor for Harsimus pier or any other pier is about 15 cents a ton.

Q. That is the general charge?

A. Yes, sir.

Q. Now I want to know what it actually costs you, as to so much of your plant as was used in that way?

A. I decline to answer unless I am compelled to by the Court. The railroad ceases at my pier, and this transportation is an open question to everybody, and the open New York charges are 15 cents a ton. I am in the transportation business entirely independent of the Pennsylvania Railroad or anything that pertains to it. It is my own affair. It is our own company's property, and we charge the same on our

boats that is charged on all boats in New York harbor. That
538 is the reason I do not think the question of our cost enters into this proposition.

By the COURT:

Q. Did I understand you to say everybody charges 15 cents a ton for this same service?

A. I say 15 cents, because it varies a few cents more or less, but the charges in New York average 15, 17, 14 or 13. The average is about 15 cents a ton. Everybody charges that for that service. The usual chartering rate of any man that owns a boat is 15 cents a ton, whether he owns one or a thousand.

The COURT: Fifteen cents being the usual charge by everyone doing that sort of service in New York harbor, the receipt of fifteen cents a ton by the Berwind-White Company for the same service is no advantage in the shape of a rebate, and the actual cost to him for performing that service is immaterial in this case, and the question inquiring into it is overruled.

(Exception noted for plaintiff.)

Mr. NEWLIN: I move to strike out or rescind the ruling your Honor has just made on the basis of an authority which I will now read, 153 Fed. Rep., page 558.

(Motion overruled. Exception noted for plaintiff.)

By Mr. NEWLIN:

Q. Now I want to know, during the period mentioned, what you were getting from those steamship lines during that period of time of those overlapping contracts, for the coal that you were selling to them.

(Objected to. Objection sustained. Exception noted for plaintiff.)

Q. You were asked to produce evidence showing respectively the tonnage upon which freight was paid by the coal company to the said railroad company, and the actual sales to steamships in the
539 same period of time of the same coal. Have you produced anything on that, the difference between the tonnage that you

were charged and what that same coal was considered as weighing when delivered to the steamship companies?

A. No, there is no way of showing that.

Q. In point of fact there was no weighing of your coal?

A. I could answer that. I think our coal was weighed during those years. It was subsequent to that time that the weights were abandoned because of the impossibility of moving the coal through Jersey City with regularity. It was abandoned against my protest and repeated protest, because it was to my disadvantage.

Q. I want to know whether you have any evidence here that will show, during this period we are speaking of, whether your coal was weighed or not weighed?

A. I assume it is.

By Mr. GOWEN:

Q. Was it not during the congestion that came in 1902 that the weighing for the time was stopped?

A. It was, and subsequently. I protested against its continuance because it was very unsatisfactory for us. It is against our interest because we have no way of checking.

Mr. NEWLIN: We are still back to the proposition that the Berwind-White Company got money back from the railroad company, and we have no evidence produced here. The subpoena duces tecum calls for it. He admits he got 15 cents under the circumstances mentioned.

Mr. GOWEN: We admit we paid it.

By Mr. NEWLIN:

Q. In addition to the monthly settlements that were made through Mr. Searles' department with the Berwind-White and other
540 companies, were there not other settlements made from time to time which were commonly known as omnibus settlements or general settlements?

A. No, sir.

Q. Do you mean to say that the monthly settlements were the only settlements which showed the payment of money by the Pennsylvania Railroad Company to the Berwind-White Company?

A. I mean to say exactly this, that we paid rates on all coal shipped except such overlapping contracts as carried another rate, and that rate was settled from time to time, how often I do not know. The accounting department will tell you exactly. We had no omnibus rates or settlements.

Q. Were there no payments made by the Pennsylvania Railroad Company to the Berwind-White Company other than the monthly reductions of the rates that appear in these letters of transmittal of Mr. Searles to Mr. Knipe?

A. Plus the overlapping contracts.

Q. But those overlapping contracts are in there?

A. If they are included, that comprises them all. No rebate, direct or indirect, of any sort or any kind was paid us, except as shown by those papers.

Q. Now I want to know how much was invested by the railroad company and how much by the Berwind-White Company on this Harsimus pier?

A. The Berwind-White paid for the entire pier.

Q. For the building of that pier?

A. Yes.

Q. It cost you in round numbers how much?

A. I think the actual cost of it, taking the original cost as shown here was \$53,000.

Q. That is all?

A. That is all the original cost of the pier. I am not speaking of maintenance.

Q. What were you to pay in the shape of rental for the Harsimus pier?

A. We paid \$61,050 in full for the cost of the improvements as originally made. The rental was \$1,800 per year.

Q. Leaving out of consideration the question of how much money the railroad put in it and how much you put in it, you were getting these facilities for \$1,800 a year rental for what term of years?

A. For a term of years subject to renewal.

Q. How much was the term?

A. The original lease was for three years.

Q. Subject to a right of renewal for what length of time?

A. Indefinite. There was no definite time stated.

Q. But it was a right that you had to have it renewed?

A. Yes, sir.

Q. That right was exercised during the whole period of these shipments, and indeed up to the present time. This lease still remains in force?

A. It has been in force ever since.

Q. During all that period of time the Berwind-White Company have had the exclusive use of Harsimus Pier to ship their coal?

A. Yes, sir.

Q. Other persons desiring to reach consumers in New York harbor had to send their coal to South Amboy?

A. We did too.

Q. No one could get to Harsimus Pier except yourself?

A. They could not because they could not ship coal. There was not facilities there. The facilities were only sufficient for ourselves.

Q. Those facilities which were only sufficient for yourselves, were given entirely to you by the railroad company, to the exclusion of anybody else?

A. I proceeded to explain how they were given, and you interrupted me before. Our business at South Amboy, before the Harsimus Pier was constructed, was so large that it embarrassed every shipper that was shipping from South Amboy to get his coal loaded promptly. The railroad company were at great loss and expense in drilling out our coal in order to get it to the pier and ship it. They suggested that this coal ought to be con-

centrated on one pier. They did not have one in South Amboy. They had an abattoir in New York Harbor at Harsimus on the New Jersey side. It was under water. They gave us authority and authorized us, if we would construct a pier there, to give us facilities of loading our coal on that pier, which was done more for their convenience than for ours at the time. That pier was constructed by us, and they allowed us the usual terminal of 15 cents a ton. That is the history of it.

Q. Nobody had the use of that pier except yourselves?

A. That is true.

Q. That being the case, having paid \$1,800 a year for rental, is it not a fact that that brought you 12 miles nearer to your customers and into the inside of a safe harbor as compared with South Amboy?

A. For which I paid.

Q. \$1,800 a year?

A. Not at all. We paid an additional freight rate.

Q. How much?

A. Five cents a ton, which was more than the equivalent of the water difference. We are discriminated against to the extent of two cents a ton.

Q. You ought to stop.

A. I tried to, but have not succeeded.

Q. You are not in a position where you want to give up Harsimus Pier to the general public, are you?

A. If I can get another pier that will handle all our business.

Q. If you can do better with some other pier you are willing to do it, but you are not willing to get rid of the five cents extra and Harsimus Pier, to throw that pier over to the general public?

A. Not unless I can substitute other facilities.

543 Q. Which would also be exclusive?

A. I do not say so. It is impossible for another shipper to ship over Harsimus Pier because it has not capacity to ship the coal the Berwind-White Company ships to New York harbor.

Q. Because you are occupying it?

A. No; it is not. It is because there is not time enough. It cannot ship the coal that goes over it today. The capacity of the pier is not sufficient.

Q. In addition to being that much nearer to the customers, such as the steamship companies, there is a difference in time between coming that much nearer by rail and coming to the same point afterward by water?

A. I paid 5 cents a ton for that privilege.

Q. But it makes a difference in the round trip of those boats from South Amboy and back again of about two days?

A. It makes nothing of the kind. It makes less than twelve hours. The time is about ten hours.

Q. Yours is about ten hours?

A. That is the only time that is consumed in that. There is no advantage in Harsimus Pier on that point.

Q. Do you mean to say there is only a difference of ten hours between Harsimus Pier and South Amboy?

A. At the extreme, ten hours.

Q. In point of fact since you have had Harsimus Pier has not your trade with steamship companies increased to an extent that you have the great bulk of it for the large lines?

A. No, sir; we have plenty of competitors who guarantee under bond to do the business as well as we do it.

Q. Do they get the business?

A. They do to some extent, to a large extent.

Q. What proportion of the trade in steamship coal, during the period of this suit, was in the hands of the Berwind-White Company.

(Objected to.)

544 The COURT: That question is ruled out, and we will not go into that question at all. It is not relevant in my judgment.

(Exception noted for plaintiff.)

Mr. NEWLIN: I wish to show that in this transaction about Harsimus Pier the net result was that the railroad company gave to the Berwind Company for \$1,800 a year a privilege, a concession that was of enormous commercial value to them, and that it was to that extent and in that way a discrimination in their favor and against other shippers, and that is just the same as if it was a money payment.

The COURT: The offer is refused for the reason that there is nothing in the statement claiming damages for a discrimination of that kind. The offer is overruled.

(Exception noted for plaintiff.)

Cross-examination.

By Mr. GOWEN:

Q. I understand you to say that the railroad company were first advised of the existence of these so-called overlapping contracts at the time the rate of freight was advanced in April, 1899. That was the first time they were advised of the existence of these overlapping contracts of yours, when the rate of freight was advanced, in April, 1899?

A. I think I can say that that is absolutely true. I am not sure enough to know whether any one of them might have been alluded to, because at that time several of our competitors in other regions and from other sections of country were making time contracts. Railroads were then in vigorous competition, and it was deemed wise by me in order to preserve our business to make such contracts. When the time came that the Pennsylvania Railroad notified us we must register all overlapping contracts, they were registered.

545 Q. While I do not suppose you can give us the actual tonnage shipped under those overlapping contracts, and the tonnage which was not embraced within them in any year, can you give us about what proportion of your tonnage was covered by the overlapping contracts.

(Objected to as not cross-examination.)

Mr. GOWEN: I want to show generally what proportion of the Berwind-White Company's shipments after April 1st, 1899, included coal shipped under those so-called overlapping contracts.

(Objected to as irrelevant. Objection overruled. Exception noted for plaintiff.)

A. Less than 10 per cent. I think considerably less.

Q. On the balance of your shipments you paid the tariff rate?

A. We did.

Q. Without any repayment?

A. Either direct or indirect.

Q. When you say that you think those shipments did not include 10 per cent., is that true of South Amboy and Harsimus shipments? When you say shipments made under those overlapping contracts did not probably include 10 per cent. of your total tonnage, is that true of the tonnage to Harsimus and South Amboy?

A. Yes. I do not remember whether we were shipping much from South Amboy at that time, but it applied to either of them.

By Mr. NEWLIN:

Q. You have said you paid full rate of shipments, either direct or indirect?

A. I said I received no payments by way of rebates. I received no rebates direct or indirect, always excepting the overlapping contracts.

546 JOHN P. GREEN, called by plaintiff, sworn.

By Mr. NEWLIN:

Q. Just look at that paper and see if that is your signature (handing paper to witness). You might keep the paper for a moment.

A. It is.

Q. Just look at that paper long enough to let yourself see what it is. You can see the date. Do you recall anything about the execution of that paper?

A. Of this special paper?

Q. Yes.

A. No, sir.

Q. Then you really have no recollection of signing that paper at all, but you recognize your signature.

A. I signed the paper. There is no doubt about that.

Q. But you don't know anything now about the contents of that paper, except what you gather hastily from your examination now.

A. Yes; I do.

Q. What is it about?

The COURT: We don't want to go into anything of that kind.

By Mr. NEWLIN:

Q. Do you know anything about the contents of this paper?

A. Only on information and belief. I have no personal knowledge.

Q. No personal knowledge.

A. No, sir.

Q. And you don't personally know whether the papers referred to are in the possession of the Railroad Company or not?

A. Only by information and belief; as advised by general counsel.

Q. Before you signed this paper, did you read it?

A. Certainly.

547 Q. And you were then of the opinion that you had no personal knowledge on the subject of the paper.

A. I say I can have no personal knowledge of a matter of that kind.

Q. You did have none.

A. I say so.

Q. How soon did you sign this paper after it was presented to you?

A. After I read it.

Q. Immediately?

A. Certainly.

Q. Who presented it to you?

A. I can't recall that. It came from our general counsel's office.

Q. Some one came from your general counsel's office and handed you this paper, and you signed it.

A. Naturally. Some one came and stated the facts set forth in it were true.

Q. Who was it that came and stated that the facts set forth were true?

A. Some one from the general counsel's office.

Q. And you don't know who he was.

A. I don't know.

Q. And is that the only source of knowledge you had that what is stated over your signature here is true?

A. Certainly.

Q. Did you make any search for the papers mentioned here?

A. Certainly not. I couldn't have found them if I did.

Q. Did you order any one else to make a search?

A. I didn't.

Q. Do you know that at any particular time any particular person in the employ of the Railroad Company was directed to search for these papers?

A. I don't.

Q. You never inquired into anything on that subject?

548 The COURT: What do you want?

Mr. NEWLIN: I want these statements of claim.

The COURT: They are not necessary to the proof of this case, and any further inquiries in regard to that are overruled, and exception given to plaintiff.

Mr. NEWLIN: The tabulations that are made here do not explain themselves.

The COURT: Explain it as much as is necessary for the issues raised in your statement; but go no further with it.

Mr. NEWLIN: I offer to prove by the further examination of this

witness that he has no knowledge of the truth of what is stated over his signature, and, further, that neither he nor the person who swore to it has any knowledge of any search being made for the papers mentioned in the rule, to wit, the statements of shippers upon which the Searles' letters were written and the statements transmitted to Mr. Knipe.

The COURT: The offer is overruled because the answer was made by an official of the corporation, who is authorized to do so upon information and belief. If there had been any statement made in the Answer about any paper material to the issues, the Court would make inquiry; but as there is no inquiry about a paper material to the issues, the offer is overruled.

(Exception to plaintiff.)

Mr. NEWLIN: I make the same offer of proof in regard to the Assistant Secretary, Mr. Groff.

The COURT: The same ruling is made as to the Assistant Secretary, Mr. Groff.

(Exception to plaintiff.)

Mr. NEWLIN: Now, I make a further call under the call 549 that is on the notes of April 29, for other matters than the statements of shippers which have just been disposed of.

The COURT: What is the call.

Mr. NEWLIN: I ask for the production now of all documentary evidence showing the payment of the 15 cents a ton back to Berwind, White & Co., so that I will see the details of that and the subject matter included.

The COURT: As Mr. Berwind swore that they did not possess any such papers, and as he admitted the receipt of it, stating that it was for carrying coal from the pier to the boats, as alleged by the plaintiff, the request is refused.

(Exception to plaintiff.)

Mr. NEWLIN: I am asking for this under the rule to produce—not under an ordinary call.

The COURT: I understand that. In order to avoid any loss of time, I will state that the Court refuses to order the production of any other papers whatever in this case, for the reason that the defendant has already produced all the papers which bear directly on the issues raised in this case.

(Exception to plaintiff.)

J. G. SEARLES, called by plaintiff, sworn.

By Mr. NEWLIN:

Q. What is your position in the Pennsylvania Railroad?

A. General Coal Freight Agent.

Q. Are you a stockholder in the Pennsylvania Railroad Company?

A. I am sorry to say I am not, sir.

Q. These letters out of your letter books that are in, are 550 the ordinary letters that are sent by you to Mr. Knipe, the Auditor of freight receipts, when a claim is made by a company for some repayment.

A. Yes, sir.

Q. And in the ordinary course of the business therefore, you sent the claim along with the letter from yourself providing for the adjustment.

A. Yes, sir.

Q. Now, those claims of shippers you have never since seen, have you?

A. No, sir. The papers weren't returned to me.

Q. And have you ever seen them since?

A. No, sir.

Q. Have you any papers in your office which will show whether Mr. Knipe, in making settlements with the companies that made the claims, settled with them on the same basis that you did, or on some other basis were granted an allowance?

A. I think in those books are copies of a paper that was sent out with the check, specifying the amount of the check. To that extent only it would show any differences.

Q. But is there anything in your office to show whether the settlements made by Mr. Knipe were for the reasons and for the subjects, and in accordance with your letter to him?

Mr. GOWEN: Mr. Knipe didn't make any settlements.

The COURT: I said under the conditions of this case there was no necessity for any other papers or any other inquiries. The defendants have produced all the papers necessary and have already produced sufficient to the extent that you have a right to recover in this case and it is not necessary to inquire for papers.

Mr. NEWLIN: I want to inquire of this witness as to settlements other than those included in the letter of transmittal that are the subject of that adult.

551 By Mr. NEWLIN:

Q. Now, I want to know whether there were any other settlements, omnibus settlements, made between the Railroad Company and shippers, in the period mentioned and between the points mentioned, which were distinct from what might be called the monthly settlements, which are the subject of those letters written by you to Mr. Knipe?

A. No, sir.

Q. You say there were no other settlements, no omnibus settlements, with any one.

A. No, sir.

Q. Were there no settlements of any kind, in addition to or other than the monthly settlements that are now in evidence?

A. None that I know of.

Q. In regard to any allowances to Berwind, White & Co., or any payments of money made by the Railroad Company, are there any such settlements that are not included in those letters of transmittal?

A. No, sir.

Q. How do you know that to be the case unless you have examined, letter by letter, those letters of transmittal? Did you examine them before they were brought here?

A. I didn't examine each letter, personally. My clerks went over them.

Q. And how was it that you came to send here thirty or forty books that had nothing to do with the subject-matter? Was that collection of books made through your orders?

A. We were instructed to bring all of the transmittal letter books covering the period.

Q. And whether that was done, or not, you don't know?

A. I assume that it was done, sir.

Q. In those letter books that you have produced, covering that period of time, there is no mention made of several payments, 552 lump payments, omnibus settlements, with the International Coal Mining Company itself. Where would those settlements be, if not in the books brought here, the transmittal books of letters to Mr. Knipe? What other books would have it?

(Objected to by defendant.)

Q. The International Coal Mining Company, on what are called omnibus settlements, actually received from the Pennsylvania Railroad Company, on the dates I am just going to mention to you, the amounts that I will mention. They received on July 1, 1898, over \$22,000 and on September 12, 1895, they received over \$14,000.

The COURT: Who received this?

Mr. NEWLIN: The International Coal Mining Company received this at the dates mentioned.

By Mr. NEWLIN:

Q. And on October 23, 1904, above \$13,000.

The COURT: What did they receive it for? Does it show it?

Mr. NEWLIN: It doesn't show; no.

By Mr. NEWLIN:

Q. That makes \$49,000. Now, an examination of your letter books that were produced here in Court, covering all those dates, fails to show any of those settlements made by your department, or any one else, with the International Coal Mining Company. I want to know in what books such payments would be kept which were not in your letter books. Where would they be? We actually got this money on those dates.

A. I had another book covering settlements made prior to the period covered here.

Q. Where is that book?

A. It is in my office.

Q. When did you begin keeping that kind of a book?

553 A. I think in 1894 or 1895; somewhere along there.

Q. And you kept it for how many years?

A. Up to April 1, 1898.

Q. Up to April 1, 1898.

A. Yes, sir.

Q. Now, that book, then, you think, would have these omnibus settlements that I have just read to you.

A. I think so.

Q. You remember that such settlements were made, do you not?

A. Yes.

Q. Then, the kind of letter books that were produced here the other day did not, up to a certain time, contain all the transactions of your office by which money was paid back to shippers.

A. I had the book here.

Q. How?

A. I had the book here in Court.

Q. Yes; but you didn't produce it. That book of yours didn't go to the audit.

A. No, sir.

Q. What was done after this date with settlements other than the monthly settlements?

A. There were none.

Q. How did you settle with Berwind, White & Co. for the 15 cents a ton on handling coal on their own Harsimus pier? What was the settlement?

A. I never made any settlement with them.

Q. Yes; but Mr. Berwind admitted here on the stand that they got that money from the Pennsylvania Railroad?

A. Yes, sir.

Q. And there is no evidence of it in your letters of transmittal.

A. Not in any books that I have.

Q. Now, through what department would such payments be made?

A. I can't answer that question positively.

554 The COURT: There is none after April 1, and we will not go into this.

Mr. NEWLIN: I am speaking of the 15 cents a ton that was paid to the Berwind-White Company. I want to get at those settlements to know what they mean, and the basis on which they were made. There is no dispute about the payments because Mr. Berwind admitted they got the money back. I want to take that up and find out where that thing is on the books of the Company.

The COURT: There is no necessity for it. You allege it was received for handling coal after reaching the pier. They got it and they admit the payment. That ends it.

Mr. NEWLIN: Does your Honor say that it was proper that 15 cents should be allowed them?

The COURT: It was settled by a former ruling. That was what everybody else received, and there was no discrimination.

Mr. NEWLIN: What is the present ruling?

The COURT: The present ruling is that no further inquiry into the payment of 15 cents to Berwind, White & Co. will be permitted to be made of this witness, because it is charged by the plaintiff that it was paid by the defendant to Berwind, White & Co. for handling coal after it was received at Harsimus pier, in placing it on the boats, and it is admitted by the defendant that the payment was made. For that reason it is not necessary to go into it any further,

if that is in accord with the plaintiff's claim as to that item. Therefore any further inquiry is overruled.

(Exception to plaintiff.)

Cross-examination.

By Mr. GOWEN :

Q. Mr. Newlin has asked you as to a payment made in
555 July, 1898, of \$22,000 to the International Coal Mining Company, and you have said that you recalled that such payment was made. What was it made for—what purpose?

(Objected to by plaintiff. Question withdrawn.)

Q. The payments concerning which Mr. Newlin interrogated you, and which were embraced in these books which were produced were not evidenced by any transmittal letter to the Auditor.

(Objected to by plaintiff. Question withdrawn.)

ROBERT H. LARGE, called by plaintiff, sworn.

By Mr. NEWLIN :

Q. What is your position with the Pennsylvania Railroad Company?

A. Coal Freight Agent.

Q. You were examined before the Interstate Commerce Commission, I think in 1906, amongst other things, in regard to certain allowances made to the Altoona Coal and Coke Company and others, an initial allowance for a sort of prorating in regard to the use of their own tracks in reaching the points of shipment of coal. You recall that, do you not?

A. Yes.

Q. Now, during the period covered by this suit, in shipments from Clearfield to South Amboy and the other points mentioned in the plaintiff's statement, were any other shippers allowed for the use of their tracks or other facilities, a reduction on the tariff rate between Clearfield and the point of destination?

A. I was not connected with the Freight Department at that time and have no direct knowledge.

Q. Well, you certainly had a knowledge that enabled you to testify to these very things before the Interstate Commerce Commission?

556 A. I was testifying as to the things that were occurring at that time.

Q. Well, but you also testified as to the history of the transactions that had occurred before.

A. I think not, sir.

Q. You therefore told that the Millwood, the Glen White, the Latrobe, the Altoona Coal and Coke Company had been getting allowances for a number of years, running over this very period that is in discussion here, for trackage—a reduction from the tariff rate

by reason of a use of a part of their own plant in getting the coal to the Pennsylvania Railroad.

A. By reason of performing a service which the Pennsylvania Railroad would otherwise perform.

Q. Exactly. And you testified as to that, did you not?

A. I don't know that I testified as to a number of years. Possibly I did.

Q. Well, I have got a synopsis of your testimony here. Didn't you testify that the Altoona Coal & Coke Company, which shipped through the Columbia Coal Company, which is one of the favored companies mentioned here, got an allowance of 12 cents for four miles of trackage, and 18 cents on points east of Bellwood? Do you remember testifying to that?

A. I think so. Yes, sir.

Q. And that is true?

A. I don't think I made any mention of the Columbia Company.

Q. No; but do you or do you not know that the Altoona Coal & Coke Company shipments were shipped in the name of the Columbia Coal Company?

A. Some of them; yes.

Q. So that in the case of some shipments made by the Columbia Coal Company, which is one of the companies named here in our statement as being discriminated in favor of, that company did carry part of the coal of the Altoona Coal & Coke Company, which Company got an allowance of 12 cents off the freight rate for
557 bringing the coal four miles to the Pennsylvania Railroad.

There is no doubt about that, is there?

A. Not the slightest.

Q. And that had been going on for quite a number of years. That was 1906 you testified, and that had been going on, and your knowledge of the business and inquiry at the time will enable you to say as to the allowance to the Company, as far back as July, 1898.

A. I never looked into the records carefully; no.

Q. But you know in a general way that it had continued for that length of time, do you not?

A. I think probably it did; yes.

Q. Now, the Millwood Company. Where is the Millwood Company? Where was its plant?

A. It is near Millwood on the main line of the Pennsylvania Railroad.

Q. It is in what is called the Clearfield region?

A. It is in what is called the Latrobe district. There are two distinct districts, the Clearfield and the Latrobe.

Q. But weren't the freight rates at this time the same from both?

A. I think the Latrobe rate was made the same in 1900 or 1901.

Q. So, covering this period of time they were the same, weren't they, for practical purposes?

A. As to freight rates.

Q. As to freight rates, during 1900 and 1901.

A. I think it was in 1900 to 1901 that the Latrobe rate was made the same as the Clearfield.

Q. What was it before? Was it higher?

A. 10 cents a ton higher.

Q. So that, at all events, the rate was quite as high all through, at the earlier period of 1898, as it was later. The cutting out of Latrobe simply brought down the rate from Latrobe 10 cents more than it had been before. It was a reduction.

558 A. Brought the Latrobe rate down to the Clearfield basis. Prior to that time it had been higher.

Q. But, however that may be, this Millwood Company got an allowance of 10 cents out of the freight rate for carrying the coal on their own tracks two miles.

A. That is correct. Yes, sir.

Q. So that they were allowed 5 cents a mile, and it covered this period.

A. I think so, sir.

Q. Now, the Glen White Coal & Coke Company got 15 cents of an allowance off of the tariff rate for carrying the coal on their own tracks one and a half miles.

A. I don't recall the exact distance. I think it is more than that.

Q. But they got 15 cents.

A. Yes, sir.

Q. And if it was more than a mile and a half, it wasn't more, all told, than two or three miles, was it?

A. No.

Q. The total trackage for which they got 15 cents wasn't over three miles.

A. No.

Q. At the most. And it was the trackage of the shipper; it was part of the shipper's plant.

A. The payment was made for the performance of service which the Railroad Company would otherwise have performed.

Q. I know; but I am asking whether this trackage wasn't a part of the plant of the shipper.

A. It was a service which the Railroad Company would otherwise have performed.

Q. I am not asking that. That is a conclusion of fact. I want to know whether the trackage on which the rebate was allowed off of the full rate from the region, wasn't a part of the plant of the shipping company?

559 A. You are conflicting two things. It wasn't trackage.

Q. What was it?

A. It was performing the service of hauling the empty cars from the connection of the Pennsylvania Railroad to the mine and returning the loads, which, under normal conditions, the Railroad Company would have performed themselves.

Q. In the case of the Glen White, there was no trackage.

A. It wasn't trackage.

Q. What was it?

A. It was for hauling the empty cars from the connection of the Pennsylvania Railroad at Kittanning Point to the mines of the Glen White Coal Company over their own railroad, a distance of a mile

and a half or possibly three miles, and returning the loaded cars, with their own power, to the connection with the Pennsylvania Railroad.

Q. Then, it is true that this Glen White Coal Company had track, of its own.

A. Yes; also power of their own.

Q. And they also had power of their own. And there was this allowance made to them of 15 cents, and that, you state, was for taking the empty cars and returning them. Is that it?

A. Taking the empty cars, hauling them over their railroad to their mines and returning the loads.

Mr. NEWLIN: Now, that very thing is what we will contend was a discrimination, because it should be shown as a matter of defense that it was a proper and legitimate thing to do.

By Mr. NEWLIN:

Q. Now, in regard to the Latrobe Coal Company. Do you understand, from your general business knowledge, that the coal of the Latrobe Company was shipped by the Columbia Coal Company?

A. I think to some extent; yes.

560 Q. That is, the Altoona Coal & Coke Company, and the Latrobe Company, and the Alexandria, and some others, were all shipping under the name of the Columbia Coal Company. You know that.

A. To some extent. Not entirely.

question. That is correct, is it not?

Q. Not entirely; but such shipments were made in the period in

A. Yes.

Q. Now, the Latrobe Company got 12 cents off the tariff rate for some service performed. What was it?

A. I don't think they got 12 cents.

Q. It is in your testimony.

By the COURT:

Q. That is the highest they ever got?

A. Ten cents, I think, your Honor. That is my recollection.

Q. Did I understand you to say one of them got 18 cents?

A. The Altoona Coal & Coke Company, prior to—well, I don't recall the dates now, but prior to, I think, 1900, got 18 cents, and since that date, my recollection is, 12 cents.

By Mr. NEWLIN:

Q. We will take that very company. There was a difference made by the Railroad Company, itself, of 6 cents in the allowance. That is to say, they cut it down 6 cents, from 18 to 12, and of course that was objected to by the other company; but it was enforced. Now, I refer you to your testimony there, page 4233—it is a figure of speech to say I refer you to it, because what I have down here of your testimony is the admission that the Altoona Coal & Coke Co. had an allowance, on four miles, of 12 cents from Altoona to Harrisburg. That is to say, on shipments from Altoona to Harrisburg

the allowance was as high as 12 cents on the four miles of the Altoona Coal & Coke Company, which was for the trackage
561 or facilities that the allowance was made. Now, it doesn't matter where it went to. This was an initial allowance at the starting point and would apply to interstate shipments as well, would it not?

A. Yes.

Q. So that during that period the Railroad Company did make such an allowance as that, which covered interstate shipments of the Altoona Coal & Coke Company, and you said there you thought it was 13 cents prior to 1902. That is what you thought about that.

A. Well, I don't recall. Your Honor, if I may, I can make this situation very clear in a very few words. There is no question about these lateral allowances. We paid them then. We are paying some to-day. The Altoona Coal & Coke Company owns a line of railroad which is four and a half to five miles long and which is over a very rough country, with three switchbacks. It is through a very rough country, with three switchbacks, very heavy grades and very heavy curvature. It is practically impossible for the Pennsylvania Railroad Company, itself to operate with its own power. The power is of such size that it could not be operated over the road. The Altoona Coal & Coke Company accepted our empty cars from us at Kittanning Point. They hauled those empties over this rough railroad a distance of five miles, to the mines. There they loaded and they returned them to the Pennsylvania Railroad at Kittanning Point. We paid them for that service a lateral allowance which we consider is quite reasonable to allow them for the service performed.

Mr. NEWLIN: I object to this. You see, it is very difficult, in a narrative form like this, without questioning, to eliminate what is relevant and what is not relevant. I move to strike out the statement so that it may be made to answer my questions, and
562 then the witness may make such explanation in regard to a particular question, as occurs to the witness, subject to exception again.

(Motion to strike out is overruled. Exception to plaintiff.)

By Mr. NEWLIN:

Q. Is it not a fact that when this 12 cents, and earlier 13 cents, were allowed to the Altoona Coal & Coke Company for those four miles of carriage, it was out of a total rate of only 55 cents? The tariff was only 55 cents, and they got back for the four miles from 12 to 13 cents.

A. You are speaking of the Greenwich rate now—Philadelphia.

Q. Yes.

A. That is within the State of Pennsylvania.

Q. I am doing it for the purpose of showing on all shipments, whether state or interstate, the Altoona Coal & Coke Company got the same allowance.

A. That happened to be a state shipment, the rate you referred to.

Q. That happened to be, that rate of 55 cents; but what I mean is, the amount, to wit, 13 cents and 12 cents, of allowance for track-

age or laterals, or whatever you choose to call it, was allowed in both state and interstate shipments, to this Company.

A. The lateral allowances were made irrespective of the destination, east-bound, except that on shipments to Altoona or Hollidaysburg the tariff charged by the Company was very low. They were not allowed as much as they were to destinations east of those places.

Q. But what I mean is that whatever allowance that was, it was made as an initial allowance, and it was without regard to whether the shipments were state or interstate. It applied to all.

A. It was without regard to the destination and was made to reimburse them for the service they performed.

563 Q. I understand; but it applied to state and interstate shipments—both.

A. All destinations.

Q. Now, wasn't at one time the allowance 18 cents on coal east of Bellwood?

A. I think it was.

Q. And therefore on coal east of Bellwood—that means shipped from a point east of Bellwood——

A. No, sir.

Q. What does it mean?

A. It means shipped from mines on the Altoona Coal & Coke Company's line by railroad to destinations east of Bellwood.

Q. And that would include state shipments and interstate shipments.

A. All shipments.

Q. So that on all those shipments there was an initial allowance to this Company, where the coal was for east of Bellwood, of 18 cents a ton?

A. At one time; yes.

Q. But it was of a time that really covered these very transactions in suit now. Your recollection of the matter is sufficient to know——

A. My recollection is it was changed in 1900.

Q. Prior to 1900, this allowance of 18 cents prevailed, and it was afterwards cut down to a smaller amount.

A. Yes; if my recollection of the date is correct.

Q. Now, take the case of the Latrobe Company. Had it not got for a period covering these shipments—I have got it here for a period of twelve years prior to 1902—10 cents a ton, on the theory that the Latrobe Company had carried coal on their own cars, and was disallowed on the discovery that they had no engines—they performed no service.

A. They didn't carry coal on their cars.

Q. No; but didn't the Latrobe Company get an allowance on the supposition of there being a lateral, or siding, or spur, or whatever you may call it?

564 A. They got a lateral, yes; of 10 cents a ton, prior to a certain date. I don't recall the date now.

Q. But the time they did get the 10 cents a ton is covered by

this litigation, say, during the years 1899 and 1900. They got it during that period.

A. That may be correct. I am not sure of those dates. It is easily verified from the books submitted here.

Q. Do you mean the books of transmittal?

A. Transmittal.

Q. As to these very things?

A. Certainly; they are all in there.

Q. Suppose you turn to any one of the cases I have been mentioning. For instance, take the Latrobe Company under the name of the Columbia Coal Company.

A. It wouldn't be under that.

Mr. GOWEN: We will admit that the payment of the Latrobe Company continued down to the period of this action.

Mr. NEWLIN: Will you admit, also, that the Latrobe Company's and the Altoona Coal & Coke Company's shipments of coal were made in the name of the Columbia Coal Company?

Mr. GOWEN: No.

By Mr. NEWLIN:

Q. Now, they got this ten cents for what? What did the Latrobe Company do to get the ten cents? It was a reduction, I understand, on the tariff—on the regular tariff rate.

A. The Latrobe Company performed certain service.

Q. What was the service?

A. They hauled some empties—so I understand from their own testimony—from the connection with our track to their mines and back; although I believe during a prior period we performed that service.

565 Q. And you furnished the engine and the Latrobe did.

A. Yes, sir.

Q. So you didn't perform the service.

A. They did at one time.

Q. So during the period they had no engine, you furnished the cars and pulled them in to their mines.

A. Yes; during part of this time.

Q. And that covered part of the time that this litigation is about, which is from the 29th of July, 1898, down to April 1, 1901.

A. So I understand Mr. Gowen admits.

Q. These are all from the Clearfield region.

A. Not the Latrobe. That is from the Latrobe district.

Q. But you testified in this hearing as to the Latrobe Company, that it was the Railroad Company that furnished the locomotive.

A. I think not, sir.

Q. Well, to refresh your memory, I will read what I have down here as a synopsis.

A. I would rather have the actual testimony.

Q. I will show it to you without reading it. Would you like to look at it?

A. I would rather see the testimony than have your synopsis.

Mr. NEWLIN: I offer this as a synopsis.

The COURT: Go ahead. If you haven't the testimony here, he will have to do the best he can from recollection.

By the COURT:

Q. What is your recollection about it now?

A. I don't understand the question.

By Mr. NEWLIN:

Q. I will read what I have here and that will refresh your memory. After stating that the coal had been carried, and so on, 566 and the allowance made, you went on to state that it was disallowed on the discovery that they had no engine. Then Mr. Searles interrupts and states that the Latrobe Company did at one time have engines and cars. Then Mr. Large says that Mr. Searles has just said so, meaning that such was the case. Then the question was asked by the Chairman of the Interstate Commerce Commission: "The Pennsylvania Railroad Company furnished the locomotives and did the service. A. Yes, sir; to 1902." In other words, during the very period that is in dispute here, the Pennsylvania Railroad Company, according to your testimony, furnished the service and furnished the locomotive, and the Latrobe Company got an allowance of 12 cents as an initial on supposed service done at the starting point. Now, that is the fact, is it?

A. My recollection is refreshed. My recollection is that during the testimony that Mr. Newlin refers to, I had no direct knowledge of the situation. I didn't become Coal Freight Agent until February, 1905. This was long prior to that time. I was questioned as to the allowance to the Latrobe Company. I had an indefinite knowledge as to the allowance and was asked if they performed a service, and I said they did. That was disputed. Mr. Searles, who was sitting alongside of me at the time and who had the direct knowledge at that time, said they had performed a service. We have since learned that during part of the period referred to we did perform a service and they did perform a service, as Mr. Lloyd testified to before the Interstate Commission. I had no direct information at the time. At the time I was connected with another department of the road.

Q. Yes; but you were in a position which put you in touch with these transactions and knowledge which you would acquire. That is a fact, is it not?

A. Simply from my natural observance of what was going on and my endeavor to pick up knowledge of the business at the time.

Q. But it served you to be examined as a witness in this 567 connection, and your testimony is what you are now giving, and the allowance did cover the period in suit, and part of the time the allowance was made to the Company when it did not perform the service and the railroad company did. You are satisfied of that?

A. There is no doubt about that.

Q. Now, there was a case of the Pennsylvania Coal & Coke Com-

pany. Didn't they get an allowance, or did they, for a short distance of half a mile, or possibly even a quarter?

A. Whereabouts, sir.

Q. Somewheres in the Clearfield region.

A. No, sir.

Q. Did they go in in any place having the same freight rate as the Clearfield, and to the same delivery points?

A. No, sir.

Q. Do you recall what this was about?

A. I suppose you mean a Gallitzin operation.

Q. That is what it was. Now, what was done and what wasn't done there in reference to making an allowance to any one for a lateral, or was there such an allowance?

A. There never was a lateral paid.

Q. What was it that was the subject of the inquiry there—that they got something that others didn't?

A. They have since sued us to get what they didn't get.

Q. They contend now that the proposition is the other way—the boot is on the other leg.

A. They contend they ought to have had a lateral.

Q. That they ought to have had it and didn't get it.

A. Exactly, sir.

Q. Wasn't there some allowance at Harsimus pier, or something in addition to the 35 cents for boat rates, and so on?

A. Not that I know of.

Q. Wasn't there \$2 additional for shifting?

568 A. Not that I know of, sir.

Q. It is in your testimony here.

A. I think not, sir. We charged them \$2 for reconsignment. We charged Berwind, White & Co. \$2 for reconsigning a car, just as we did anybody else at South Amboy. It was not a payment from us to them, but a payment from them to us.

Q. I understand. Now, touching the weighing of the coal of the Berwind, White Company, you were examined in this hearing before the Interstate Commerce Commission in 1906, as to the practical effect of that weighing, and you testified. Just tell us, in your own way, what was the method of estimating the weight of the coal in the solid trains of the Berwind-White Company, going, we will say, from Clearfield to Harsimus pier, instead of weighing them in the usual way?

A. Your Honor, in 1902——

Q. That began in 1902.

A. Let me finish, please.

Q. Yes.

A. —the Pennsylvania Railroad——

The COURT: That isn't in this case.

The WITNESS: It has nothing to do with it; absolutely nothing to do with it.

By Mr. NEWLIN:

Q. It didn't go back as far as 1901. Now, in going into the subject of what the Millwood Company did to earn the allowance that

Q. That is what the railroad company told you?

572 A. Yes, sir.

Q. That is what you call forbidding you to make contracts?
A. Yes, sir. It was not an edict issued in writing that we were forbidden to do it. It was in the sense in which you say.

Q. Did you not purchase coal from Mr. McFadden?

A. Yes, sir; the Black Lick Company. The shipping point was Cresson.

Q. What were the terms of your purchase of that coal?

A. I do not recall altogether, but it was always on a mine price.

Q. Was not the arrangement between you and Mr. McFadden simply this, that you handled the coal and sold it on commission?

A. No, sir.

Q. You say that was not the case?

A. I do not recall a commission transaction with Mr. McFadden.

Q. Was it not the case that you handled that coal on a commission equal to one-half the profit?

A. I am not prepared to say that we did not, because that might have been a transaction that I do not recall.

Plaintiff rests.

Defendant's Evidence.

J. G. SEARLES, recalled.

By Mr. GOWEN:

Q. I wish you would state whether after April, 1899, any adjustment of rates or rebates from rates, or whatever you choose to call them, were made or paid by the railroad company, except in
573 respect to coal shipped under what we have been referring to as unexpired, overlapping or unfilled contracts?

A. No, sir.

Q. Settlements after that date were confined to shipments of that character?

A. I think so.

Q. You are familiar in a general way with the volume of shipments made by the various shippers on the road, are you not, what they were during that period?

A. In a general way; yes, sir.

Q. Were the adjustments which were made with any shipper on account of unfilled contracts made on his or its total tonnage?

(Objected to as irrelevant. Also because the railroad company has the whole evidence on the subject and can prove it in the regular and proper way.)

(Objection sustained. Exception noted for defendant.)

Mr. NEWLIN: I understand it to have been admitted at bar by the counsel for defendant, that the tabulations of the New York Audit Company show for the year ending March 31st, 1899, that the Berwind-White Company and the Morrisdale Coal and Coke Company received a return on overlapping contracts equal to five cents on shipments to South Amboy, and in the case of the Berwind-

White Company to Harsimus Pier. Then that on the next year, the year ending April 1st, 1901, there was a repayment to the same people on the same cause of overlapping contracts of 35 cents a ton, and that as to Mechanicsville in the second year was 20 cents, and to Pittsfield, Mass., 25 cents, and Bridgeton, New Jersey, five cents, and that the International Coal Mining Company got nothing back on any of these periods and points.

574 Mr. GOWEN: I think that correctly states the result of the examination, with this qualification, that this adjustment, which Mr. Newlin has referred to as having been made with the Berwind-White and Morrisdale Coal Companies, was also made with other companies shown in this statement, and that the adjustments made with those companies were not in all cases continuous, but were made from month to month, as shown by the audit company's report.

Mr. NEWLIN: It is also, I understand, admitted that, taking them altogether, it covered the whole period of the plaintiff's shipments within the dates given.

Mr. GOWEN: So far as South Amboy is concerned.

Counsel for defendant offers in evidence an exemplification of the record of Court of Common Pleas No. 1 in the case of the Cresson and Clearfield Coal and Coke Company vs. The International Coal Mining Company, of June Term, 1901, No. 3588, the same exemplification, having been filed of record in this case, for the purpose of showing the sale of the franchises and assets of every character, including choses in action and claims in action, of the plaintiff company, under the order of the Court of Common Pleas No. 1, which sale was made by the Sheriff of Philadelphia County on September 29th, 1905, and subsequently confirmed by Court of Common Pleas No. 1.

(Objected to.)

The COURT: The objection is sustained for the reason that this Court has decided that this chose in action did not pass by the sale. (Exception noted for defendant.)

Testimony closed.

575

PHILADELPHIA, May 22nd, 1908.

Mr. NEWLIN: In order to avoid any complication about Case No. 25 being in this record, I am going to hand to the clerk an order to discontinue Case No. 25, so that will dispose of that.

ROBERT M. RICKEY, recalled.

By Mr. NEWLIN:

Q. In the tabulation of allowances by Mr. Searles to Mr. Knipe, do the tabulations made by your report to the Court on the Searles letters of transmittal and allowances to shippers, set forth in these letter books, contain any reference to the Altoona Coal and Coke Company?

A. They do not.

Q. Please state whether the said letters of transmittal of Searles to Knipe show any allowances made from the freight tariff rate to the Altoona Coal and Coke Company?

(Objected to.)

Mr. NEWLIN: I want to prove that as to this company there were continuous allowances during the entire period of shipments of the International made under the head of "Terminal expenses" and so forth, for the Altoona Coal and Coke Company, which is the one that is shown to have had this 18 cents allowance per ton on its own tracks and services at the initial point, which is the very thing that the case I cited yesterday shows cannot enter into a reduction of the freight rate.

(Objected to. Objection overruled. Exception noted for defendant.)

Q. State whether the said letters of transmittal of Searles to Knipe show any allowances made from the freight tariff rate to 576 the Altoona Coal and Coke Company?

A. Yes, sir.

Q. State whether in these cases the letter of transmittal from Searles to Knipe referred to a claim of the Altoona Coal and Coke Company transmitted?

A. Yes, sir.

Q. State whether the allowances to the Altoona Coal and Coke Company were continuous during the period of the plaintiff's shipments as made the basis of your report?

A. Yes, sir; they were.

Q. State how the allowances to the Altoona Coal and Coke Company were classified and referred to in said letters from Searles to Knipe?

A. They were for terminal expenses on shipments of coal from Kittanning points and points east of Altoona or South of Hollidaysburg.

Q. State whether Mr. Searles' letters of transmittal of these allowances mentioned as transmitted the claims of the Altoona Coal and Coke Company therewith?

A. They were in every particular just like all the other transmittal letters, but they do not relate to points which were shown in your statement.

Q. Did the letter of transmittal say that "herewith the claim of the Altoona Coal and Coke Company" was transmitted to Mr. Knipe as in the other letters?

A. Yes, sir.

Q. Were these claims of the Altoona Coal and Coke Company thus transmitted to Mr. Knipe, produced at the audit?

A. No more than any other claims were.

Q. Were any claims presented?

A. No.

Q. I mean the enclosures sent to Mr. Knipe were not presented in the case of the Altoona Coal and Coke Company, any more than any of the others?

577 A. No, they were not.

Q. Have you made any memorandum from the letters of transmittal in the same general scope as your tabulations, showing what is set forth in the allowance letters as to what was allowed and how to the Altoona Coal and Coke Company?

A. Yes, sir; I have it here.

Q. Read it.

A. This I have addressed to the Court, just as our other report was.

To the Honorable Judge of the Circuit Court of the United States for the Eastern District of Pennsylvania.

HONORABLE SIR: Agreeable to the request of counsel for the plaintiff in the case of International Coal Mining Company vs. Pennsylvania Railroad Company, we have supplemented our examination of the documents contained in packages marked "G" and "H" as follows:

The defendant's press copies of letters transmitting claims between the "Auditor Coal Freight Receipts" and "Coal Freight Agent" relating to Altoona Coal and Coke Company were examined, and, for each month from July, 1898, to March, 1901, inclusive, rates of eighteen cents per ton for "Terminal Expenses on shipments of coal from Kittanning points to points east of Altoona or south of Hollidaysburg" were found. In addition to "Terminal Expenses," these rates were shown as being for either "laterals", "lateral allowances", "lateral charges" or "terminal allowances."

These rates were not included in our tabulations submitted to your Honor on the 19th of May, 1908, as the names of the plaintiff's competitors agreed upon by counsel for the plaintiff and defendant did not include the Altoona Coal and Coke Company, nor are the destinations to which these rates apply shown in the plaintiff's statement of shipments, which was the basis of our investigation.

578

Very truly yours,

THE AUDIT COMPANY OF NEW
YORK.

ROBERT M. RICKEY.

Acting Philadelphia Manager.

Phila., Pa., May 22, 1908.

By the COURT:

Q. Did you figure out the amount of allowances paid to the plaintiff's competitors from July 29th, 1899, to July 1st, 1901?

A. No, sir; not in terms of dollars and cents nor in terms of tons. We simply showed the rates that were quoted to the competitors in these transmittal letters.

Q. Is there any way of getting at that at once?

A. Not from those transmittal letters.

Q. Did not the transmittal letters show the amount transmitted?

A. They show the amount, but in many cases they refer to intra-

state shipments as well as interstate shipments, and we could not separate them.

Q. Is there any way of getting the total amounts of shipments to these destinations mentioned by the plaintiff?

A. There is no way that I know of.

Q. Did you not make any statement of the number of tons shipped by the plaintiff during that period from July 29th, 1899, to July 1st, 1901?

A. We did for the plaintiff.

Q. How much was that?

Mr. NEWLIN: We agree upon those figures being correct. They are less than our own, for the reason Mr. Wilson gave, and our claim proceeds on the basis of the amount found by the audit as the shipments of the plaintiff. We have a tabulation of what we
579 will claim, for instance, on overlapping contracts, on the basis of the audit company's finding of our own tonnage.

Q. How much did the plaintiff ship to South Amboy from July 29th, 1899, to July 1st, 1901?

A. That is, throughout the entire period?

Q. Yes.

A. 41,767 tons.

Q. How much to Pittsfield, Mass.?

A. It would take me some time to make that recapitulation in that manner, to get the amount for each destination. I understood your Honor to say for the entire period, irrespective of what the rates may have been. I have a memorandum I have made here showing the number of tons involved at each destination where there was a difference in the rate. During the first year of this examination there were no differences in the rates, and those tons were not included in this memorandum that I have.

By Mr. GOWEN:

Q. Judge Holland only asked you for the tonnage to South Amboy from July 29th, 1899. You have covered the year 1898.

A. I know I have.

The COURT: What I want is the shipments from April 1st, 1899.

Mr. NEWLIN: Our calculation is just on the basis your Honor is trying to get at now.

J. CHESTER WILSON, recalled.

By Mr. NEWLIN:

Q. As to Kittanning, Tyrone, Altoona, Bellwood and Huntingdon, in what region in Pennsylvania for freight rates are those places?

A. They are all in the Clearfield region. There is no coal originates from Huntingdon.

580 Q. Is it not a fact that all of the plaintiff's shipments were for points of delivery east of Bellwood and east of Altoona?

A. Yes, sir.

Q. I want you to identify and verify the calculations you made from the auditor's calculations as to this matter of overlapping contracts, the tonnage there and the amounts we claim with interest thereon at the rate of five cents and thirty-five cents respectively, and state when you began and when you ended, and whether you followed the allowances of tonnage made by the auditor?

A. Beginning with April 1st, 1899, and taking only the plaintiff's tonnage allowed by the auditor, there was a shipment in April and in June to Bridgeton, New Jersey.

Q. Referring to the calculation that you have made, I understand it goes from April 1st, 1899, and the last shipment that you made that is included in the overlapping was in February, 1901?

A. Yes, sir.

Q. Have you in this calculation applied to that tonnage the rates of reduction respectively of five cents, twenty cents and thirty-five cents, as set opposite the names of the terminal points as shown by the audit?

A. Yes, sir; I have.

Q. Then have you calculated in a column the amount that you claim the plaintiff is entitled to on the respective shipments in the columns as given?

A. I have.

Q. Have you added interest up to what date?

A. Up to May 20th, 1908.

Q. The last column is the total, and added up it amounts to \$12,013.51?

A. It does.

Q. That is the sum total of allowances on overlapping and interest thereon up to May 20th, 1908?

A. Yes, sir.

581 Q. Further down on the same page you have, "adding for trackage allowance, see next page, \$15,409.77." Does that allude to the Altoona Coal and Coke cases?

A. Yes, sir.

Q. On the next page, the statement of claim, you give details of what enters into those \$15,000 of claims?

A. Yes, sir.

Q. The last thing is, "adding under commercial value, see page 3, \$12,132.96." As I understand it, that is on the basis of claiming an allowance of 25 cents a ton on shipments made to South Amboy and other points, tabulated by the audit, which audit shows that the Berwind-White Coal Mining Company was making shipments at the same time and from and to the same point?

A. Only the tonnage to South Amboy for the period before mentioned, from April 1st, 1899, to and including our last shipment in February, 1901, taking in all cases the figures from the New York Audit Company's statement.

Cross-examination.

By Mr. GOWEN :

Q. In that statement what do you make the Bridgeton tonnage which you shipped?

A. 59 tons.

Q. On which you claim an allowance of what?

A. Five cents per ton, gross ton all the time.

Q. Pittsfield?

A. 27 tons at 25 cents.

Q. The Mechanicsville shipments?

A. As to the Mechanicsville shipments I have set out the tonnage by months according to the audit company's statement, but have not the total for that year.

582 By the COURT :

Q. How did you make your calculation if you did not total it?

A. I calculated it by months.

Q. What is the total of the shipments?

A. I think it is 9,044 tons, which I added in pencil later.

By Mr. GOWEN :

Q. 8,044, is it not?

A. No; 9,044 up to and including January, 1900. 9,044 tons at 20 cents. The following period at five cents on my pencil figure of the total of tons.

By the COURT :

Q. Mechanicsville at five cents?

A. That finishes Mechanicsville.

By Mr. GOWEN :

Q. What are your South Amboy shipments?

A. South Amboy from June, 1899, there being no shipments in April or May, to the end of March, 1900, it is set out by months. I think the total is 12,251 tons at five cents. Then the last period April, 1900, to South Amboy, to the last shipment in February, 1901, 16,475 tons I think at 35 cents.

By the COURT :

Q. Did the letters of transmittal show returns to competitors of a greater amount than this amount you claim?

A. No, sir. The price per ton was stated, and it was no greater amount than this outside of the Altoona Coal and Coke.

Q. I mean taking all the letters that you examined stating the returns that were made to your competitors, would there have been more returned as a whole in a lump sum than you claim?

A. No, sir; the same thing.

Q. The letters of transmittal showed that there was a
583 certain amount of money paid to your competitors?

A. Yes, sir.

Q. I am not now referring to what they were carrying the coal at. I am referring to the total that was paid to your competitors?

A. Yes, sir.

Q. Each letter of transmittal gave a certain sum paid to each?

A. Yes, sir.

Q. The total amounts paid to your competitors during this period as shown by these letters, would they amount to more than you claim here?

A. Yes, sir; if I understand you. Very large amounts were paid to some of the competitors. I cannot quite understand the question.

Q. Each one of those letters said, for instance, Mr. Searles writing to Mr. Knipe, giving the amount of the settlement of repayment to the Berwind-White Company, we will say, giving a statement upon which it is based, ending up with the amount of probably \$31,000. Each letter has that amount in the total?

A. Yes, sir.

Q. Take those totals of all the letters that you examined during this period. Would that amount to more than you are claiming as damages here?

A. Vastly more. There were a great many of them and they made very large shipments, and their amounts ran very high, in some cases, especially the one you have mentioned, the Berwind-White.

By Mr. NEWLIN:

Q. They were enormously more than what you are claiming here to get back for the International Coal Mining Company?

A. Yes, sir.

Testimony closed.

584 Mr. Newlin now moves for judgment by default against the defendant for failure to produce the documentary evidence specified in the order of April 2nd, 1907, on the rules to produce therein referred to.

(Motion for judgment by default overruled. Exception noted for plaintiff.)

PHILADELPHIA, May 22nd, 1908.

Charge of the Court.

HOLLAND, J.:

GENTLEMEN OF THE JURY: In this case, as I view it, the important matters of fact have finally narrowed themselves down to within a very small compass, and I therefore congratulate you upon the near termination of your very arduous duties, because I do not think it is necessary to go into very much of what appeared at first to be a complicated and troublesome case. This is a suit under the Interstate Commerce Act, and the object of that statute, as has been well said by Judge Grosscup in a case where a party was indicted

for violating it, "is to prevent one shipper from getting an advantage over his competitor in matters of rates, only where they both make substantially a like offering to the carrier. There can therefore be no conviction under this section" (it was in regard to a criminal offense) "until it is alleged and proved that an advantage in rates has been given by the carrier to one person over that obtained by another, where both persons, fairly considered, are upon an equality in time, kind and circumstances of their offerings." This applies equally to a suit by one carrier who alleged he has not received the same return that another carrier has, competing with it, and in that way has been damaged. I might further say that proof of a rebate granted by a carrier to a shipper, for instance,

from Philadelphia to Chicago, would not establish a right
585 of recovery of a like rebate on the part of shippers using such carrier's line for shipments from Philadelphia to New York, or to any other point than to Chicago. A rebate received by the competitor of the shipper, for which the shipper can recover, must be a rebate between the same points; in other words, it must be a like and contemporaneous service, a like kind of traffic, and rendered under substantially similar circumstances and conditions. If all those elements enter into the transportation of property for competing shippers, and one shipper gets a return from the carrier over and above the tariff rate, which is not allowed to the other shipper, then the other shipper can be said to have been injured to the amount of the allowance allowed to its competitor, whether you call it a rebate, a settlement, a repayment, or give it any other name. If under those circumstances that I have related, one shipper is permitted by any device to ship its property for less than its competitor, the railroad, or the carrier, is liable for the damage done.

The Act says that "If any common carrier, subject to the provisions of this Act, shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this Act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful." Then the third section prevents undue and unreasonable preferences, and the eighth section of the Commerce Act provides that in case any common carrier, subject

to the provisions of the Act, shall do, cause to be done, or
586 permit to be done, any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to any person or persons injured thereby for the full amount of damages sustained in consequence of any such

violation of the provisions of this Act, together with a reasonable counsel fee, and so forth.

You will see therefore that in case a carrier violates any of the provisions of this Act it will be liable in damages to the person injured, and among the things prohibited is the allowing of any special privilege to one shipper over another, where the services rendered are like services under substantially similar circumstances and conditions, where they are contemporaneous, and where the traffic is of the same kind. In this particular case we will have, as I remember the evidence (but that is a matter for you), very little trouble about the question as to whether the coal shipped by the plaintiff and its competitors was shipped contemporaneously or not, because it appears that this coal was shipped continuously almost between the first day of April, 1899, and the first day of April, 1901, both by the evidence for the plaintiff and that for the defendant. As to the question of a like kind of traffic, it would seem from the evidence there is very little difficulty in this case in concluding that the traffic was of a like kind. It was the shipment of coal alone and we might say that the evidence is uncontradicted that the traffic was of a like kind. Whether the service was a like service, rendered under substantially similar conditions and circumstances, is more of a question, and it will be for the jury to find in all these cases whether or not the services were of a like kind, or rendered under substantially similar circumstances and conditions.

Under the Interstate Commerce Act transportation companies are required to publish their rates from certain points to certain
 587 points, and it has been the practice of the transportation companies throughout the country to designate certain districts as the initial point, and the Interstate Commerce Commission has permitted that to be done, because it would be impossible for a transportation company to schedule every small station or by-way from which it transports its commerce. If Philadelphia is the initial point, it may be that Camden, Norristown, Doylestown, West Chester, and other neighboring places may be taken in a particular district as part of the initial point. I do not say that is the case, but railroad companies are permitted to take in a scope of country as an initial point, and the Interstate Commerce Commission has said that is a compliance with the law, and when a railroad company does take in a district as an initial point from which to ship its goods, and schedules that in its tariff rates as an initial point or district from which it is transporting merchandise, it is conclusive evidence against the railroad company that as to all merchandise and property of like kind from that particular district the service is, as to the initial point, a like service under substantially similar circumstances and conditions. That is to say, so far as the starting point is concerned, the services are rendered under similar circumstances and conditions. All the Clearfield district, as designated in these tariff schedules, is on the same footing. Any man shipping coal out of the Clearfield district, if he ships to the same destination under similar circumstances, it makes no difference where he loads his coal in the Clearfield district, is receiving only a like service under substantially

similar circumstances and conditions, and under this law a railroad company will not be permitted to say to one shipper in the Clearfield district, "Because you are ten miles further west than another company, therefore we will make the other company which is ten miles nearer the destination an allowance for that difference." The man

who is ten miles nearer in that district must pay as much as
588 the man who is ten miles further west. That is right, because

if he thinks that he is unjustly discriminated against, he can present his petition to the Interstate Commerce Commission, and he can have that schedule adjusted so that justice will be done, and there is a provision in the Interstate Commerce Act that wherever schedules are not equitably adjusted in that particular as to long and short hauls, or within a district, as I have related to you, a shipper, instead of asking a competing railroad company to violate the law by giving a rebate, can go to the Interstate Commerce Commission and have the schedule adjusted so that he will be justly dealt with in regard to rates. All this coal that was shipped from the Clearfield region was started from the same point, under the law, but was it shipped to the same destination? It must have been shipped to the same destination (not necessarily the same identical point, but to a destination substantially similar), under similar circumstances and conditions. It must have been a point probably scheduled in the tariff rates at the same figures. Points of destination with which we are concerned at present must be in direct competition with each other, both entirely supplying the same market, one not having any advantage in the market that the other would not have. In other words, two points which would, in disposing of the property when it arrived at its destination, be entirely or substantially similar, would be points on shipments to which rebates would not be allowed. If one shipper is shipping to A and another shipper is shipping to B from the Clearfield district, and the points, A and B, are ten miles apart, but at both points there are only the same customers with no advantage whatever, no substantial difference in the market as to either of them, the coal would be shipped substantially to the same place, if the tariff rates posted by the railroad company make them points of shipment for which the same amount was charged.

589 Applying that principle to this case, you take, for instance,

the shipments to Mechanicsville. Coal shipped from the Clearfield district to Mechanicsville has the same initial point and the same point of destination. Can it be said that there is any difference in services in that particular? If you believe the evidence the shipments by the plaintiff and its competitors to Mechanicsville were services rendered contemporaneously (or at any rate there is no evidence to show that they were not contemporaneous), but you will have to inquire about that from the evidence), and there was a like kind of traffic and a like service rendered under substantially similar circumstances. The same can be said as to Pittsfield, Mass., and as to Bridgeton, N. J. But when we come to Harsimus Pier and South Amboy, which are points twelve miles apart, one at New York Harbor and the other at the south of it, it is for you to say as a matter of fact whether shipments to these two points are a like kind

of traffic and a like service rendered under substantially similar circumstances and conditions. You must find from the evidence whether the shipments to South Amboy and to Harsimus Pier, were, in the language of the Act, "services rendered under substantially similar circumstances and conditions."

In the first place, you have the railroad's tariff to South Amboy and the railroad's tariff to Harsimus Pier. You have testimony as to where this coal was used, where the customers came from, what advantages the one place might have over the other, if any, or whether they are similar, and you will consider all the evidence for the purpose of finding whether the services rendered were like services under substantially similar circumstances and conditions. If you find that they are not entirely competitive points, that they are not similarly located, that the services rendered are not like services under substantially similar circumstances and conditions, it makes no difference at which point shippers got the advantage,

590 because, as I have said to you already, if a shipper to Harsimus Pier was paid a rebate and it was not on a shipment in direct competition with the plaintiff, a like service under substantially similar circumstances and conditions, the plaintiff would not be injured because it would only be a return that a shipper got from the railroad company, and the railroad company would have gotten that much less for transporting the property. If, however, incidentally the plaintiff was injured, if the condition was not one that brought the two points directly within the language of the act, making it a like service rendered under substantially similar conditions and circumstances, but incidentally it was injurious to the plaintiff that shipments twelve miles above him were made by the railroad company for the same or less than he was paying at South Amboy, he, or the shipper to Harsimus if the conditions were reversed, could go to the Interstate Commerce Commission and have the rates adjusted so that the schedule would be just as to both of them. But if you find that these points are entirely competitive, and that it was a like service rendered under substantially similar circumstances and conditions, then any rebate or return or settlement which the railroad company gave to any other shipper to Harsimus Pier, whether on overlapping contracts or on any other shipments, would be illegal, and a person shipping to South Amboy who was required to pay a schedule rate which was higher would be entitled to recover from the railroad the difference of the return. Because under this Interstate Commerce law railroads cannot be permitted to make returns privately or secretly to people who say they have overlapping contracts. If that were permitted you can see how it would put into the hands of large shippers and railroads a power to deceive shippers if they saw fit, and it cannot be permitted, and it has been decided that whether the contracts are overlapping or not, they cannot give a certain rate to men who have overlapping contracts, and make other shippers in competition, who have 591 shipments to the same point and receive like services under similar circumstances and conditions, pay more. When they put on their schedule a certain rate from certain points to certain

points, that is what they are required to collect from everybody who is shipping while that schedule is in effect. It is contended by the defendant that if shippers have overlapping contracts they can be classified. The Interstate Commerce Act authorizes the classification of commerce. You can ship coal for one price per ton, iron pipe for another and pig iron for another. In other words, there is a classification of commerce. Whether they could classify overlapping contracts, schedule them and make them public, or not, is not a question in this case, but it is a question whether or not, when they schedule a certain figure for the transportation of property from one point to another, as their tariff rate, and make that public, they are bound by it, and the law is that they cannot have a private agreement, overlapping or not overlapping, which gives a competitor, during the contemporaneous shipments, a return or an advantage over the published rate.

There is a claim here for rebates and discriminations against this plaintiff from July 29th, 1898, down to July 1st, 1901. The Court has already ruled that this plaintiff cannot recover for any discrimination against it in the way of rebates between the 28th day of July, 1898, and the 1st day of April, 1899.

Mr. NEWLIN: May I take an exception now?

The COURT: Yes; you can take an exception.

(Exception noted for plaintiff.)

The COURT: The Court so ruled because between those two periods this plaintiff was receiving the same rebates that its competitor was receiving. This Commerce Act says that any device, any return, shall be declared to be unlawful, and while it has been suggested on one side or the other that there was no law preventing a shipper from soliciting or accepting a rebate. I find that the Commerce Act, as amended on March 2nd, 1889, says, "If any such person, or any officer or agent of any such corporation or company, shall by payment of moneys," that is, by bribery, "or other thing of value, by solicitation, or otherwise, induce any common carrier subject to the provisions of this Act, or any of its officers or agents, to discriminate unjustly in his, its or their favor as against any other consignor or consignee, in the transportation of property, or shall aid or abet any common carrier in such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction, within the district in which the offence was committed, be subject to a fine, not exceeding \$5,000, or imprisonment in the penitentiary for a term not exceeding two years." So that up until July 1st, if all the evidence is to be believed, the plaintiff, its competitors and the defendant, were all engaged in violating the law; the railroad company in giving rebates unlawfully; the plaintiff in soliciting and accepting the same rebates that its competitors solicited and accepted; and under those circumstances courts do not sit to measure the difference in degree of violation of the law in favor of one party or the other. The question of the money value that each of them received in their violation of the law, will not be looked into, nor taken up, nor is

vestigated by courts of justice. Courts of justice are not instituted to measure the difference in money value to two people who are engaged in the violation of the same law, and therefore the Court will not permit them to recover, not for the purpose of relieving the defendant, but because the plaintiff is just as culpable, and under this law, if any criminality attaches, has been just as much a violator of the law as the defendant. That is the reason I say they cannot recover up to that time.

(Exception noted for plaintiff.)

After the first day of July the plaintiff received no rebates. Of course, if he received no rebates we cannot inquire into the intention. It might be that the plaintiff after the 1st of July was not good because he wanted to be good and not violate the law, but it was because the defendant would not permit him to be bad, but, as I say, we cannot inquire into the intention. We must only take the fact and enforce it as we find it. The fact is that the plaintiff did not receive any rebates after the 1st of July, 1899, and where a man is acting in accordance with the law the presumption is that he is doing it with an intention to observe the law. In this case it may be a violent presumption, but such is the presumption of law, and this case must be decided upon those principles. (Whatever impression we may have from a knowledge that these three parties were violating this law at the same time we must not permit it to induce us to take an improper view of the law in its enforcement.) The Interstate Commerce Act is a very important Act, and must be enforced in accordance with the intention of Congress, and the intention is that no shipper shall get an advantage over any other shipper. It must, of course, be enforced reasonably and sensibly, so that we will not interfere with the just and reasonable management of railroads, nor can we permit railroads upon a plea of necessity to have any device or arrangement by which they can give one shipper an advantage over another. There are no doubt railroads that do not desire to do so, and there may be some who would desire to do so, but the best way is to enforce the law as Congress intended it should be enforced, so that all will be required to live up to its provisions.

I refuse all the points which I have been requested to charge you upon by plaintiff and defendant, with these exceptions:

Mr. NEWLIN: Mr. Wilson calls my attention to the fact that in fixing the date you spoke of it as July.

The COURT: It was from April 1st, 1899, to April 1st, 1901.

As to the defendant's third point, "The Interstate Commerce Act enjoins and requires equality of charge by a carrier only in respect to services which are like and contemporaneous, and rendered in the transportation of a like kind of traffic, under substantially similar circumstances and conditions," of course, that is true.

All the others are refused.

Mr. NEWLIN: I will ask an exception to your Honor's leaving it to the jury to say whether Harsimus Pier and South Amboy are the same. I also call attention to the fact that the schedule of shipments as reported by the Auditor, shows that at the same time we

were shipping to South Amboy the Berwind-White Company was shipping both to South Amboy and Harsimus Pier.

The COURT: Gentlemen of the jury, it is claimed here by the plaintiff that the evidence shows that there was coal shipped on overlapping contracts to South Amboy at the time the plaintiff was shipping to South Amboy, upon which its competitors got the same allowance as an overlapping contract. Of course, if there is such evidence (you will remember that), and it shows that competitors from the 1st day of April, 1899, to the 1st day of July, 1901, were shipping to South Amboy coal from the Clearfield district on overlapping contracts, or any other contracts upon which they got an allowance in competition with the plaintiff who got no allowance,

595 it would be shipping from the same point to the same point, and it would be a like service under substantially the same conditions and circumstances.

(Counsel for defendant asks for a more specific instruction in reply to the eighth point submitted by defendant.)

The COURT: I do not think that there is anything at issue in this case that depends on the testimony of Mr. Wilson. If I did I would call attention to the fact that Mr. Wilson has sworn to conditions at different times differently. The fact that this coal was shipped by the plaintiff is established. The schedule of the railroad company is not disputed. Mr. Wilson testified, of course, that consignee paid the freight and returned the balance to him. It makes no difference who would get the advantage, the plaintiff is the proper party to sue. There is no doubt the freight was paid, and there is no dispute here that there was any different amount collected than the schedule rate. It was collected from somebody, and it was either collected from the consignee or the plaintiff, and whichever it was collected from, the plaintiff is the proper party to sue. Mr. Wilson's testimony does not seem to me to be of importance to the finding of any material fact in this case.

Mr. GOWEN: Your Honor will allow us an exception to the refusal of our points, and also to that portion of your charge in which you said that when the defendant establishes rates from one district, that it is to be conclusively presumed against it, that all the services rendered by it in transporting from that district are like and similar. I presume your Honor intended that instruction to cover the shipments made over the Huntingdon and Broad Top Railroad, although you did not specifically deal with that feature of the case.

The COURT: I understood there were not any Huntingdon and Broad Top shipments claimed here.

(After a discussion between counsel.)

596 The COURT: Gentlemen of the jury, it is contended by the defendant that all the shipments made by the plaintiff during this time, starting from the Huntingdon and Broad Top Railroad, were not in the Clearfield district, and that the evidence does not show that they were in the Clearfield district, and for that reason they were not a like service rendered under substantially similar conditions and circumstances. The plaintiff contends that the shipments on the Huntingdon and Broad Top Railroad and the point

of shipments from which the plaintiff shipped its coal on that road, are in the Clearfield district, and that the evidence in this case shows that they were treated as being in the Clearfield district. You will say which is correct. You will say whether the evidence shows it is in the district, or is not in the district. If it is in the district, the shipments from that point would be from the same initial point. If it is not in the district they would not be from the same initial point. It is a matter for you.

Mr. GOWEN: I desire to take an exception to the submission to the jury of the question whether there is any evidence that this point was in the Clearfield region.

With your Honor's permission I will hand this computation, which has been prepared by the Audit Company, which takes the shipments made from various points, distinguishing Saxton from the others, so that if the jury should find the Huntingdon and Broad Top shipments were in a different category, the totals may be before them.

(Objected to by plaintiff.)

The COURT: It is a calculation of counsel. It is like any other counsel's calculation. The Auditor's account can go out with it, and if the jury see fit they can verify it.

Mr. GOWEN: I only want the jury to understand that Saxton is the Huntingdon and Broad Top point.

(Objected to by plaintiff.)

The COURT: Gentlemen of the jury, it is contended by the defendant that Saxton, on the Huntingdon and Broad Top Railroad, is not within the Clearfield district, and they say that there is evidence to establish that. What it is you will recall, if there is such evidence, and if you find that there is evidence to show that it is not within the Clearfield district, then you will say whether or not a shipment from Saxton is a shipment from a point which makes the service a like service rendered under substantially similar conditions and circumstances. If you find that it is not such a service, then, of course, all the shipments that were sent by the plaintiff from Saxton were out of the calculation. The plaintiff says that shipments on the Huntingdon and Broad Top Railroad are within the Clearfield district, that all these letters of transmittal of the defendant trace them as within the Clearfield district, and that one of the witnesses swore that Saxton was in the district. Mr. Wilson said it was in the district. You will say what credit you give to his testimony in view of what the defendant says he swore to at different times. But, at any rate, the plaintiff says that there is evidence here to show from the defendant's own letters that the Huntingdon and Broad Top Railroad is in the Clearfield district. If you find it is within the Clearfield district, then all the shipments from Saxton would be in.

Mr. SELLERS: I request that your Honor's charge be reduced to writing and filed as part of the case.

Counsel for plaintiff submitted the following points:

598 1. (Overlapping contracts.)

The evidence and admission of counsel for the defendant show that the Berwind-White Coal Mining Company and others

received the following allowances on "overlapping contracts," and "unfilled contracts" which were denied to the plaintiff, viz., 5c. per ton from April 1st, 1899, to March 31st, 1900, and 35c. from April 1st, 1900, to March 31st, 1901, for the same period of time and between the Clearfield region in Pennsylvania and South Amboy, as plaintiff's shipments, and plaintiff is entitled to a verdict therefor with interest from allowance.

(Refused. Exception noted for plaintiff.)

2. (Overlapping contracts.)

"The evidence and admission of counsel for the defendant show that allowances were made on overlapping contracts to Berwind-White Coal Mining Company and others and denied to the plaintiff on shipments of the same time and between Clearfield region in Pennsylvania and the following points for the amounts specified, viz., to Mechanicsville, 20 cents; to Pittsfield, Mass., 25 cents, and to Bridgeton, N. J., 5 cents, and plaintiff is entitled to a verdict therefor with interest from allowance."

(Refused. Exception noted for plaintiff.)

3. (Initial allowances for laterals.)

"The evidence shows that during the period of all of the plaintiff's shipments from the Clearfield region, the Altoona Coal & Coke Company received a reduction on the freight rate on account of tonnage carried on its tracks to the junction with the Pennsylvania Railroad Company on all points east of Bellwood of 18 cents per ton.

"And the evidence shows that part of these shipments were made through the Columbia Coal Company which appears on the Auditor's tabulations of shipments to have shipped from the Clearfield
599 region to South Amboy and other points of shipment of the plaintiff from July 29, 1898, to April 1st, 1901, and the evidence shows that some of these shipments for account of the Altoona Coal & Coke Company were included in shipments made at the same time and between the same points as the plaintiff's shipments as reported by the tabulation of the Auditor. The plaintiff is entitled to a verdict therefor with interest from its freight payment."

(Refused. Exception noted for plaintiff.)

4. "The allowance to the Altoona Coal & Coke Company, of 18 cents per ton on shipments from the Clearfield region at the same time and for similar points of destination as plaintiff's are shown to have been made for services claimed to have been rendered by the Altoona Coal & Coke Company in moving coal on its laterals to the junction with the P. R. Co. being part of its plant. The whole allowance was a rebate forbidden by the Interstate Commerce Act. The plaintiff is entitled to a verdict therefor with interest from its freight payment."

(Refused. Exception noted for plaintiff.)

5. "The allowance to the Altoona Coal & Coke Company of 18 cents per ton on shipments from the Clearfield region at the same time and for similar destination as plaintiff's and claimed by the defendant to have been for services rendered by the Altoona Coal & Coke Company in moving coal on its laterals to the junction with the Pennsylvania Railroad Company being part of its plant, no evidence has been submitted by the defendant to show what part, if any,

was for lawful reason and no part of the allowance can be considered as being shown to be lawful. The plaintiff is entitled to a verdict therefor with interest from its freight payment."

(Refused. Exception noted for plaintiff.)

6. "The evidence shows that defendant by contract vested 600 in the Berwind-White Coal Mining Company, the exclusive use of Harsimus Pier, during the whole period of plaintiff's shipments."

(Refused. Exception noted for plaintiff.)

7. The evidence shows that during the whole period of the plaintiff's shipments the defendant allowed the Berwind-White Coal Mining Company to make continuous contracts extending beyond the current freight year expiring March 31st of the current year for shipments between the same points as plaintiff's shipments and at the same time and that some of these contracts were for a period for as much as two and one-half years."

(Refused. Exception noted for plaintiff.)

8. During the entire period of the plaintiff's shipments it was cautioned by the defendant not to make contracts extending beyond the succeeding March 31st."

(Refused. Exception noted for plaintiff.)

9. The evidence shows that the exclusive use granted by the defendant to Berwind-White Coal Mining Company of Harsimus Pier and of the right to make contracts for the delivery of coal extending beyond the succeeding March 31st, had a commercial value to Berwind-White Coal Mining Co. equivalent in cash to different sums named by different witnesses. This constituted a discrimination against the plaintiff on all its shipments the same as if the defendant had paid a sum of money to the Berwind-White Coal Mining Co. The jury is to fix from the evidence what this was worth to the Berwind-White Coal Mining Company and the plaintiff is entitled to a verdict therefor on all its shipments for an amount per ton equal to the amount per ton which the jury finds to have been the advantage derived from the defendant by the Berwind-White Coal Mining Co."

(Refused. Exception noted for plaintiff.)

601 10. There is evidence before the Jury that irrespective of the exclusive use of Harsimus Pier by Berwind-White Coal Mining Company, the permission by the defendant, to wit: to make overlapping contracts was a commercial advantage to the Berwind-White Coal Mining Company which was inherent in the right itself to make such a contract. One witness, Mr. F. A. von Boynebergh, has so testified, and has stated his opinion as to what the commercial value of the privilege was in money to the Berwind-White Coal Mining Company, if you find the fact to be as testified by this witness, or if you find a different value from what is fixed by the witness upon the value thus ascertained by the jury, the plaintiff in the verdict is entitled to an allowance of that amount per ton upon all its shipments made to South Amboy or Mechanicsville, between April 1st, 1899, to April 1st, 1900, with interest from the time of the payment by the plaintiff of its freight on said shipments."

(Refused. Exception noted for plaintiff.)

"11. In considering the allowance of 18 cents per ton to Altoona Coal & Coke Company for shipments east of Bellwood, which includes all of plaintiff's shipments, the jury may consider whether the ownership of the coal and of the railroad by the Altoona Coal & Coke Company and the difficult nature of the territory covered is not itself evidence of an unlawful rebate by putting upon the defendant the burden of enabling the Altoona Coal & Coke Company to get its coal to market in circumstances in which the Altoona Coal & Coke Company was not willing to pay the cost but in this way it put it upon the Railroad Company, which would in itself constitute a discrimination against the plaintiff."

(Refused. Exception noted for plaintiff.)

602 "12. The allowance by the defendant to the Berwind-White Coal Mining Company of 15 cents per ton for handling its own coal on Harsimus Pier, which constituted a part of the plant of the Berwind-White Coal Mining Company, was an illegal rebate and the evidence shows that it was paid during the entire period of the plaintiff's shipments to South Amboy, and the plaintiff is entitled in the verdict to an allowance of that amount on all said shipments of plaintiff with interest from the time the plaintiff's freight was paid."

(Refused. Exception noted for plaintiff.)

"13. The evidence shows that during that whole period of the plaintiff's shipments to South Amboy the plaintiff was allowed forty cents for terminal expenses. The jury is to determine from the evidence whether this included not only actually boat freights but an allowance to the plaintiff for delay in reaching New York Harbor.

"The evidence shows that for the same period of time on Berwind-White Coal Mining Company's shipments to Harsimus Pier this allowance, under the name of terminal expenses, included moving of the coal from Harsimus Pier in the barges of Berwind-White Coal Mining Co., which constituted a part of its plant, the same constitutes an unlawful rebate and the jury can estimate the amount from the evidence in the cause and include it in a verdict in favor of the plaintiff on all of plaintiff's shipments to South Amboy."

(Refused. Exception noted for plaintiff.)

Counsel for defendant submitted the following points:

603 "1. There is no evidence that the plaintiff was charged or paid a rate of freight on its shipments made between July 29, 1898, and April 1st, 1899, greater than was charged to and paid by other shippers to the same destinations, and as to its shipments made between these dates the plaintiff is not entitled to recover anything from the defendant."

(Refused. Exception noted for defendant.)

"2. There is no evidence that shipments of other shippers made after April 1st, 1899, were carried by the defendant to destinations to which the plaintiff was shipping at lower freight rates than it charged the plaintiff on its shipments to such destination, except certain shipments made by the other shippers embracing coal which had been sold by such other shippers prior to April 1st, 1899, under contract deliveries under which were required to be made after April 1st, 1899."

(Refused. Exception noted for defendant.)

"3. The Interstate Commerce Act enjoins and requires equality of charge by a carrier only in respect to services which are like and contemporaneous, and rendered in the transportation of a like kind of traffic, under substantially similar circumstances and conditions."

(Affirmed.)

"4. If the jury believe that it would tend to the benefit of its shippers and would also tend to secure for it a larger volume of business, the carrier is not guilty of discrimination forbidden by the Interstate Commerce Act, because it carries at rates of freight in force at the time such contracts were entered into, coal embraced in and shipped under contracts extending for a period of time, even though at the same time it may be charging a higher rate on coal not covered by or embraced in contracts of such character, provided it extends the benefit of the lower rates to all shippers having such contracts, and shipping coal thereunder."

(Refused. Exception noted for defendant.)

604 "5. The burden is upon the plaintiff to prove that the service rendered by the defendant in the transportation of the coal for other shippers on which it charged a lower rate was a like service to that which it rendered the plaintiff. As to the plaintiff's shipments which originated on the line of the Huntingdon & Broad Top Railroad, the service performed by the defendant in transporting these shipments was not a like service to that which it performed in transporting shipments originating on its own lines, and hence the plaintiff cannot recover as to any of its shipments which originated on the Huntingdon & Broad Top Railroad."

(Refused. Exception noted for defendant.)

"6. The evidence discloses the fact that South Amboy and Harsimus were not the ultimate points of destination of the coal shipped to those points by the plaintiff and other shippers, the ultimate destination of all such coal being points and places beyond. The plaintiff has not shown to what points the coal carried by the defendant for its account to South Amboy was destined, and has not shown that any of the coal transported by the defendant at lower rates to South Amboy and Harsimus went to the same destination as its coal. The plaintiff is not, therefore, entitled to recover anything on account of the shipments carried for its account by the defendant to South Amboy."

(Refused. Exception noted for defendant.)

"7. The plaintiff is not entitled to recover on its shipments made in any one month or period of time because of the fact that during such time the defendant transported at a lower rate than it charged the plaintiff a portion of the shipments of some other shipper. If such lower rate was not justified the amount which the plaintiff is entitled to recover is measured by the difference between the rate per ton which it paid on all its shipments during such period and the rate per ton which the other shipper paid on his or its whole volume of shipments during such period."

605 "As there is no evidence from which the jury can estimate the rate per ton paid on all their shipments by the shippers, a portion of whose shipments were carried at lower rates than were charged the plaintiff, there is no basis upon which to estimate the

amount which the plaintiff is entitled to recover, and it is only, therefore, entitled to recover nominal damages."

(Refused. Exception noted for defendant.)

"8. The evidence establishes the fact that the plaintiff itself did not pay the freights a portion of which it now claims a right to recover. Payment of these freights, as the evidence shows, was made by those who purchased the coal from the plaintiff on which the freights were paid.

"In order to entitle the plaintiff to recover it must have established to your satisfaction that under the terms of sale of this coal it, and not the purchasers, would have received the benefit of any reduction in the rate. The only evidence as to the terms of sale is that given by Mr. Wilson. The credibility of his testimony is for you to consider. If you are not satisfied to accept it as true, the plaintiff cannot recover. In considering the credit which you should give to Mr. Wilson's testimony on this point, it is due to the defendant that you should take into account the fact, if it be a fact, that the testimony of Mr. Wilson on other points or the statements embodied in the record of this case, which he has sworn to, have been shown to have been either false or inaccurate, and that you should further consider whether any circumstance has been established which fairly excuses the non-production by the plaintiff of its books showing the character of the transactions between itself and the purchasers of the coal."

(Refused. Exception noted for defendant.)

606 "9. As it appears from the evidence that the plaintiff since April, 1899, or shortly thereafter, became conversant with the fact that the defendant was carrying at lower rates coal shipped under what has been referred to in the case as unfilled or overlapping contracts, the subsequent payment by it of the rates charged by the defendant on the coal carried for its account, if, in point of fact, such payments were made by it or on its account, without protest of any sort against the right of the defendant to charge and collect the rate which it was thus required to pay, debar it from maintaining any action to recover any part of the freight thus paid."

(Refused. Exception noted for defendant.)

"10. To entitle the plaintiff to recover anything in excess of nominal damages as to its shipments made after April 1st, 1899, the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was carrying at the same time at lower rates coal shipped by other shippers. The plaintiff has not shown that it did sustain any such loss or injury, and it is entitled, therefore, to recover only nominal damages, even if the carriage at such lower rates for other shippers by the defendant was not justified."

(Refused. Exception noted for defendant.)

"11. Under all the evidence in the case the plaintiff is only entitled to recover nominal damages, and your verdict should accordingly be only for such an amount."

(Refused. Exception noted for defendant.)

"12. Under all the evidence in the case the plaintiff is not entitled to recover, and your verdict must be for the defendant."

(Refused. Exception noted for defendant.)

THE AUDIT COMPANY OF NEW YORK
CIRCUIT COURT OF THE UNITED STATES

EXHIBIT "A"

INTERNATIONAL COAL MINING COMPANY (PLAINTIFF)
V. THE COAL COMPANY (DEFENDANT)

STATEMENT OF SHIPMENTS BY THE PLAINTIFF ON THE
MENT FROM JULY 29, 1898, TO MARCH 31, 1899

	Initial points men- tioned in Plain- tiff's statement	Destination mentioned in Plaintiff's statement.	Destination not shown in Plaintiff's state- ment claimed by Plaintiff to be included as shown hereon.	Tonnage as per books offered to and marked "Manifest."
1898				
July	Altoona	Albany, N. Y.		204
August	Altoona	Albany, N. Y.		238
	Altoona	Troy, N. Y.		184
	Saxton	Syracuse, N. Y.		112
	Tyrone	Absecon, N. J.		22
	Cresson	N. Brunswick, N. J.		61
	Altoona	Springfield, Mass.		22
	Cresson	Long Island, N. Y.	Long Beach, L. I.	48
September	Altoona	Albany, N. Y.		281
	Altoona	Green Island, N. Y.		420
	Saxton	Syracuse, N. Y.		159
	Saxton	Ontario, N. Y.		28
	Cresson	N. Brunswick, N. J.		18
	Cresson	Paterson, N. J.		18
	Cresson	Lee, Mass.		134
October	Altoona	Albany, N. Y.		1,099
	Altoona	Green Island, N. Y.		192
	Saxton	Union Hill, N. Y.		20
	Saxton	Auburn, N. Y.		24
	Cresson	N. Brunswick, N. J.		29
	Cresson	Lee, Mass.		267
	Cresson	Pittsfield, Mass.		51
November	Altoona	Albany, N. Y.		644
	Altoona	Green Island, N. Y.		127
	Tyrone	Absecon, N. J.		27
	Cresson	N. Brunswick, N. J.		55
	Cresson	Lee, Mass.		125
	Cresson	Pittsfield, Mass.		59
	Cresson	Glendale, Mass.		20
	Cresson	Long Island City, N. Y.	Babylon, N. Y.	29

*"Tariff Rate" is for Ontario, N. Y.

THE AUDIT COMPANY OF NEW YORK.

CIRCUIT COURT OF THE UNITED STATES.

EXHIBIT "A"

NATIONAL COAL MINING COMPANY (PLAINTIFF) VS. PENNSYLVANIA RAILROAD COMPANY (DEFENDANT).

STATEMENT OF SHIPMENTS BY THE PLAINTIFF ON THE COAL MENTIONED IN ITS STATEMENT FROM JULY 29, 1898, TO MARCH 31, 1899, INCLUSIVE.

Initial points mentioned in Plaintiff's statement	Destination mentioned in Plaintiff's statement.	Destination not shown in Plaintiff's statement claimed by Plaintiff to be included as shown hereon.	Tonnage as per books offered to us and marked "Manifest."	Tariff rates as per coal tariff offered to us by the Defendant.	Net rate from documents produced by Court and marked exhibits "G" and "H."	Reduction of tariff rate.	Account of Allowance.	Lowest "Net Rate" shown for any competitor named in Plaintiff's statement as being lower than Plaintiff's "Net Rate."
Altoona	Albany, N. Y.		204	\$1.80	\$1.35	\$0.45	Terminal Expenses	\$1.35
Altoona	Albany, N. Y.		238	1.80	1.35	.45	Terminal Expenses	1.35
Altoona	Troy, N. Y.		184	1.80	1.35	.45	Terminal Expenses	1.35
Saxton	Syracuse, N. Y.		112	1.65	1.35	.30	Terminal Expenses	1.35
Tyrone	Absecon, N. J.		22	1.75	1.50	.25	Terminal Expenses	....
Cresson	N. Brunswick, N. J.		61	1.70	1.30	.40	Terminal Expenses	....
Altoona	Springfield, Mass.		22	2.80	2.55	.25	Terminal Expenses	....
Cresson	Long Island, N. Y.	Long Beach, L. I.	48	1.85	1.10	.75	Terminal Expenses	1.10
Altoona	Albany, N. Y.		281	1.80	1.35	.45	Terminal Expenses	1.35
Altoona	Green Island, N. Y.		420	1.80	1.35	.45	Terminal Expenses	....
Saxton	Syracuse, N. Y.		159	1.65	1.35	.30	Terminal Expenses	1.35
Saxton	Ontario, N. Y.		28	1.86	1.61	.25	Terminal Expenses	....
Cresson	N. Brunswick, N. J.		18	1.70	1.30	.40	Terminal Expenses	....
Cresson	Paterson, N. J.		18	1.85	1.55	.30	Terminal Expenses	1.55
Cresson	Lee, Mass.		134	2.55	2.05	.50	Terminal Expenses	2.05
Altoona	Albany, N. Y.		1,099	1.80	1.35	.45	Terminal Expenses	1.35
Altoona	Green Island, N. Y.		192	1.80	1.35	.45	Terminal Expenses	1.35
Saxton	Union Hill, N. Y.		20	*1.86	1.61	.25	Terminal Expenses	....
Saxton	Auburn, N. Y.		24	1.65	1.35	.30	Terminal Expenses	1.35
Cresson	N. Brunswick, N. J.		29	1.70	1.30	.40	Terminal Expenses	1.30
Cresson	Lee, Mass.		267	2.55	2.05	.50	Terminal Expenses	2.05
Cresson	Pittsfield, Mass.		51	2.55	2.05	.50	Terminal Expenses	2.05
Altoona	Albany, N. Y.		644	1.80	1.35	.45	Terminal Expenses	1.35
Altoona	Green Island, N. Y.		127	1.80	1.35	.45	Terminal Expenses	1.35
Tyrone	Absecon, N. J.		27	1.75	1.50	.25	Terminal Expenses	1.50
Cresson	N. Brunswick, N. J.		55	1.70	1.30	.40	Terminal Expenses	1.35
Cresson	Lee, Mass.		125	2.55	2.05	.50	Terminal Expenses	2.05
Cresson	Pittsfield, Mass.		59	2.55	2.05	.50	Terminal Expenses	2.05
Cresson	Glendale, Mass.		20	2.55	2.05	.50	Terminal Expenses	2.05
Cresson	Long Island City, N. Y.	Babylon, N. Y.	29	1.85	1.10	.75	Terminal Expenses	1.10

* "Tariff Rate" is for Ontario, N. Y.

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THE AUDIT COMPANY OF NEW YORK.
CIRCUIT COURT OF THE UNITED STATES.

EXHIBIT "A"

INTERNATIONAL COAL MINING COMPANY (PLAINTIFF) VS. PENNSYLVANIA RAILROAD
COMPANY (DEFENDANT).

STATEMENT OF SHIPMENTS BY THE PLAINTIFF ON THE COAL MENTIONED IN ITS STATE-
MENT FROM JULY 29, 1898, TO MARCH 31, 1899, INCLUSIVE.

	Initial points men- tioned in Plain- tiff's statement	Destination mentioned in Plaintiff's statement.	Destination not shown in Plaintiff's state- ment claimed by Plaintiff to be included as shown hereon.	Tonnage as per books offered to us and marked "Manifest."	Tariff rates as per coal tariffs offered to us by the Defendant.	Net rate from docu- ments produced by Court and marked ex- hibits "C" and "H."	Reduction of tariff rate.	Account of Allow- ance.	Lowest "Net Rate" shown for any com- petitor named in Plaintiff's statement same source as Plain- tiff's "Net Rates."
December, 1898	Altoona	Albany, N. Y.		550	\$1.80	\$1.35	\$.45	Terminal Expenses	\$1.85
	Altoona	Green Island, N. Y.		183	1.80	1.35	.45	Terminal Expenses	1.35
	Cresson	New Brunswick, N. J.		27	1.70	1.30	.40	Terminal Expenses	1.30
	Saxton	Palmyra, N. J.		29	1.60	1.30	.30	Terminal Expenses	....
	Altoona	Lee, Mass.		135	2.55	2.05	.50	Terminal Expenses	....
	Cresson	Lee, Mass.		242	2.55	2.05	.50	Terminal Expenses	....
	Cresson	Pittsfield, Mass.		48	2.55	2.05	.50	Terminal Expenses	2.05
	Cresson	Glendale, Mass.		59	2.55	2.05	.50	Terminal Expenses	2.05
	Saxton	So. Framingham, Mass.		88*	*1.80	*1.35	.45	Terminal Expenses	1.35
January, 1899	Altoona	Albany, N. Y.		530	1.80	1.35	.45	Terminal Expenses	1.35
	Cresson	Albany, N. Y.		142	1.80	1.35	.45	Terminal Expenses	1.35
	Cresson	Green Island, N. Y.		84	1.80	1.35	.45	Terminal Expenses	1.35
	Tyrone	New Brunswick, N. J.		68	1.70	1.30	.40	Terminal Expenses	1.30
	Cresson	Lee, Mass.		82	2.55	2.05	.50	Terminal Expenses	2.05
	Cresson	Pittsfield, Mass.		124	2.55	2.05	.50	Terminal Expenses	2.05
	Altoona	Pittsfield, Mass.		113	2.55	2.05	.50	Terminal Expenses	2.05
	Saxton	E. Albany, N. Y.	Framingham, Mass.	116	1.80	1.35	.45	Terminal Expenses	1.35
	Saxton	Rotterdam Jct., N. Y.	Cambridge, Mass.	225	1.70	1.35	.35	Terminal Expenses	....
	Saxton	Rotterdam Jct., N. Y.	Waverly, Mass.	115	1.70	1.35	.35	Terminal Expenses	....
	Cresson	Pittsfield, Mass.	Lenoxdale, Mass.	23	2.55	2.05	.50	Terminal Expenses	2.05
	Cresson	Pittsfield, Mass.	Gt. Barrington, Mass.	29	2.55	2.05	.50	Terminal Expenses	2.05
February, 1899	Altoona	Albany, N. Y.		84	1.80	1.35	.45	Terminal Expenses	1.35
	Saxton	Albany, N. Y.	Framingham, Mass.	106	1.80	1.35	.45	Terminal Expenses	1.35
	Saxton	Albany, N. Y.	E. Cambridge, Mass.	56	1.80	1.35	.45	Terminal Expenses	1.35
	Saxton	Albany, N. Y.	E. Boston, Mass.	56	1.80	1.35	.45	Terminal Expenses	1.35
	Saxton	Rotterdam Jct., N. Y.	Ayer, Mass.	141	1.70	1.35	.35	Terminal Expenses	....
	Tyrone	Long Island City, N. Y.	Lynbrook, L. I.	29	1.85	1.10	.75	Terminal Expenses	1.10

*"Tariff Rate" and "Net Rate" are for E. Albany, N. Y.

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THE AUDIT COMPANY OF NEW YORK.
CIRCUIT COURT OF THE UNITED STATES.

EXHIBIT "A"

INTERNATIONAL COAL MINING COMPANY (PLAINTIFF) VS. PENNSYLVANIA RAILROAD
COMPANY (DEFENDANT).

STATEMENT OF SHIPMENTS BY THE PLAINTIFF ON THE COAL MENTIONED IN ITS STATE-
MENT FROM JULY 29, 1898, TO MARCH 31, 1899, INCLUSIVE.

	Initial points men- tioned in Plain- tiff's statement	Destination mentioned in Plaintiff's statement.	Destination not shown in Plaintiff's state- ment claimed by Plaintiff to be included as shown hereon.	Tonnage as per books offered to us and marked "Manifest."	Tariff rate as per coal tariffs offered to us by the Defendant.	Net rate from docu- ments produced by Court and marked ex- hibits "G" and "H."	Reduction of tariff rate.	Account of Allow- ance.	Lowest "Net Rate" shown for any com- petitor noted in Plaintiff's statement same source as Plain- tiff's "Net Rates."
March, 1899	Altoona	Albany, N. Y.		120	\$1.80	\$1.35	\$0.45	Terminal Expenses	\$1.35
	Cresson	Albany, N. Y.		102	1.80	1.35	.45	Terminal Expenses	1.35
	Saxton	Albany, N. Y.		325	1.80	1.35	.45	Terminal Expenses	1.35
	Altoona	Mechanicville, N. Y.		1,769	1.80	1.35	.45	Terminal Expenses	1.35
	Cresson	Mechanicville, N. Y.		495	1.80	1.35	.45	Terminal Expenses	1.35
	Saxton	Mechanicville, N. Y.		193	1.80	1.35	.45	Terminal Expenses	1.35
	Tyrone	New Brunswick, N. J.		55	1.70	1.30	.40	Terminal Expenses	1.30
	Altoona	Pittsfield, Mass.		125	2.55	2.05	.50	Terminal Expenses	2.05
	Saxton	E. Albany, N. Y.	Framingham, Mass.	114	1.80	1.35	.45	Terminal Expenses	1.35
	Saxton	E. Albany, N. Y.	Cambridgeport, Mass.	29	1.80	1.35	.45	Terminal Expenses	1.35
	Saxton	Albany, N. Y.	E. Cambridge, Mass.	53	1.80	1.35	.45	Terminal Expenses	1.35
	Saxton	Albany, N. Y.	E. Everett, Mass.	29	1.80	1.35	.45	Terminal Expenses	1.35
	Saxton	Albany, N. Y.	E. Boston, Mass.	28	1.80	1.35	.45	Terminal Expenses	1.35
	Saxton	Rotterdam Jet., N. Y.	Ayer, Mass.	100	1.70	1.35	.35	Terminal Expenses	....
	Saxton	Rotterdam Jet., N. Y.	Gardner, Mass.	29	1.70	1.35	.35	Terminal Expenses	....
	Saxton	Mechanicville, N. Y.	Somerville, Mass.	57	1.80	1.35	.45	Terminal Expenses	1.35
	Tyrone	Long Island City, N. Y.	Babylon, L. I.	27	1.85	1.10	.75	Terminal Expenses	1.10

THE AUDIT COMPANY OF NEW YORK.

CIRCUIT COURT OF THE UNITED STATES.

EXHIBIT "A"

INTERNATIONAL COAL MINING COMPANY (PLAINTIFF) VS. PENNSYLVANIA RAILROAD COMPANY (DEFENDANT).

STATEMENT OF SHIPMENTS BY THE PLAINTIFF ON THE COAL MENTIONED IN ITS STATEMENT FROM JULY 29, 1898, TO MARCH 31, 1899, INCLUSIVE.

	Initial points mentioned in Plaintiff's statement	Destination mentioned in Plaintiff's statement.	Destination not shown in Plaintiff's statement claimed by Plaintiff to be included as shown herein.	Tonnage as per books offered to us and marked "Manifest."	Tariff rate as per coal tariffs offered to us by the Defendant.	Net rate from documents produced by Plaintiff marked "G" and "H."	Reduction of tariff rate.	Account of Allowance.	Lowest "Net Rate" shown for any commodity named in Plaintiff's statement same source as Plaintiff's "Net Rates."
1898									
September	Cresson	South Amboy		*231	\$1.35	\$0.90	\$0.45	Terminal Expenses	\$0.90
	Tyrone	South Amboy		659	1.35	.90	.45	Terminal Expenses	.90
October	Cresson	South Amboy		320	1.35	.90	.45	Terminal Expenses	.90
	Tyrone	South Amboy		371	1.35	.90	.45	Terminal Expenses	.90
November	Tyrone	South Amboy		778	1.35	.90	.45	Terminal Expenses	.90
December	Tyrone	South Amboy		810	1.35	.90	.45	Terminal Expenses	.90
	Saxton	South Amboy		320	1.35	.90	.45	Terminal Expenses	.90
	Tyrone	South Amboy		1,430	1.35	.90	.45	Terminal Expenses	.90
1899									
January	Altoona	South Amboy		485	1.35	.90	.45	Terminal Expenses	.90
	Saxton	South Amboy		866	1.35	.90	.45	Terminal Expenses	.90
February	Tyrone	South Amboy		2,975	1.35	.90	.45	Terminal Expenses	.90
	Saxton	South Amboy		845	1.35	.90	.45	Terminal Expenses	.90
March	Tyrone	South Amboy		441	1.35	.90	.45	Terminal Expenses	.90
	Altoona	South Amboy		804	1.35	.90	.45	Terminal Expenses	.90
	Saxton	South Amboy		741	1.35	.90	.45	Terminal Expenses	.90
	Tyrone	South Amboy		965	1.35	.90	.45	Terminal Expenses	.90

NOTE:

Tariff Rate is for New York Harbor (\$1.75) less allowance for water freight (\$0.40) for reshipment via. So. Amboy. No "Tariff Rate" for Harsimus.

"Net Rate" for shipments to Harsimus shown for Berwind White Coal Mining Company 95 cents for Sept., Oct., Nov., Dec., 1898, and Jan., 1899, and 90 cents for Feb. and March, 1900.

*Tonnage omitted in book marked "Manifest" and obtained from book called "Tidewater."

THE AUDIT COMPANY OF NEW YORK.
CIRCUIT COURT OF THE UNITED STATES.

EXHIBIT "B"

INTERNATIONAL COAL MINING COMPANY (PLAINTIFF) VS. PENNSYLVANIA RAILROAD
COMPANY (DEFENDANT).

STATEMENT OF SHIPMENTS BY THE PLAINTIFF ON THE COAL MENTIONED IN ITS STATE-
MENT FROM APRIL 1, 1899, TO MARCH 31, 1900, INCLUSIVE.

		Initial points men- tioned in Plain- tiff's statement	Destination mentioned in Plaintiff's statement.	Tonnage as per books offered to us and marked "Manifest."	Tariff rates as per coal tariffs offered to us by the Defendant.	Net rates from docu- ments produced by Court and marked ex- hibits "G" and "H."	Reduction of tariff rates.	Account of Allow- ances.	Net rates of Plaintiff's competitors' from documents produced by Clerk of Court and marked packages "G" and "H."			
									Name of shipper.	Net rate.	Reduction of tariff.	Account of allowances terminal expenses
April,	1899	Tyrone	Poughkeepsie, N. Y.	29	\$1.85	None	None	None	Columbia Coal Mining Co.	\$1.20	\$0.05	Cons. Glass Wks.
		Saxton	Bridgeton, N. J.	30	1.25	None	None	None	Berwind White Coal Mining Co.	1.20	.05	Unexp. Contract
		Altoona	Pittsfield, Mass.	27	2.30	None	None	None	Berwind White Coal Mining Co.	2.05	.25	Unexp. Contracts
May,	1899	Altoona	Mechanicsville, N. Y.	542	1.55	None	None	None	Morrisdale Coal Company	1.35	.20	Unexp. Contracts
		Cresson	Mechanicsville, N. Y.	113	1.55	None	None	None	Berwind White Coal Mining Co.	1.35	.20	Ovlp. Contracts
		Saxton	Mechanicsville, N. Y.	56	1.55	None	None	None	Berwind White Coal Mining Co.	1.35	.20	Ovlp. Contracts
		Cresson	Long Beach, N. J.	121	2.30	None	None	None				
		Cresson	Babylon, N. Y.	22	1.95	None	None	None				
		Cresson	N. Brunswick, N. J.	52	1.35	None	None	None				
		Tyrone	N. Brunswick, N. J.	182	1.35	None	None	None				
June,	1899	Altoona	Mechanicsville, N. Y.	1,656	1.55	None	None	None	Morrisdale Coal Company	1.35	.20	Unexp. Contracts
		Saxton	Mechanicsville, N. Y.	620	1.55	None	None	None	Berwind White Coal Mining Co.	1.35	.20	Ovlp. Contracts
		Cresson	Babylon, N. Y.	29	1.95	None	None	None				
		Cresson	N. Brunswick, N. J.	136	1.35	None	None	None				
		Tyrone	N. Brunswick, N. J.	69	1.35	None	None	None	Columbia Coal Mining Co.	1.20	.05	For Glass Wks.
July,	1899	Tyrone	Bridgeton, N. J.	29	1.25	None	None	None	Berwind White Coal Mining Co.	1.20	.05	For Glass Wks.
		Altoona	Mechanicsville, N. Y.	284	1.55	None	None	None	Morrisdale Coal Co.	1.35	.20	For Fthbg. R. R.
		Saxton	Mechanicsville, N. Y.	1,817	1.55	None	None	None	Berwind White Coal Mining Co.	1.35	.20	Ovlp. Contracts
		Tyrone	N. Brunswick, N. J.	160	1.35	None	None	None				
August,	1899	Cresson	Mechanicsville, N. Y.	279	1.55	None	None	None	Berwind White Coal Mining Co.	1.35	.20	Ovlp. Contracts
		Saxton	Mechanicsville, N. Y.	798	1.55	None	None	None	Berwind White Coal Mining Co.	1.35	.20	Ovlp. Contracts
		Tyrone	N. Brunswick, N. J.	148	1.35	None	None	None				
September,	1899	Cresson	Mechanicsville, N. Y.	665	1.55	None	None	None	Berwind White Coal Mining Co.	1.35	.20	Ovlp. Contracts
		Saxton	Mechanicsville, N. Y.	192	1.55	None	None	None	Berwind White Coal Mining Co.	1.35	.20	Ovlp. Contracts
		Cresson	N. Brunswick, N. J.	46	1.35	None	None	None				
		Saxton	Absecon, N. J.	28	1.60	None	None	None				
October,	1899	Cresson	Mechanicsville, N. Y.	17	1.55	None	None	None	Berwind White Coal Mining Co.	1.35	.20	For Fthbg. R. R.
November,	1899	Saxton	Albany, N. Y.	169	1.55	None	None	None				
		Saxton	Mechanicsville, N. Y.	1,012	1.55	None	None	None	Berwind White Coal Mining Co.	1.35	.20	For Fthbg. R. R.
December,	1899	Saxton	Albany, N. Y.	503	1.55	None	None	None				
		Tyrone	Albany, N. Y.	23	1.55	None	None	None				
		Saxton	Mechanicsville, N. Y.	687	1.55	None	None	None	Berwind White Coal Mining Co.	1.35	.20	For Fthbg. R. R.

CIRCUIT COURT OF THE UNITED STATES.

EXHIBIT "B"

INTERNATIONAL COAL MINING COMPANY (PLAINTIFF) VS. PENNSYLVANIA RAILROAD COMPANY (DEFENDANT).

STATEMENT OF SHIPMENTS BY THE PLAINTIFF ON THE COAL MENTIONED IN ITS STATEMENT FROM APRIL 1, 1899, TO MARCH 31, 1900, INCLUSIVE.

		Initial points mentioned in Plaintiff's statement	Destination mentioned in Plaintiff's statement.	Tonnage as per books offered to us and marked "Manifest."	Tariff rates as per coal tariffs offered to us by the Defendant.	Net rates from documents produced by Court and marked exhibits "G" and "H."	Reduction of tariff rates.	Account of Allowances.	Net rates of Plaintiff's competitors' from documents produced by Clerk of Court and marked packages "G" and "H."			
		Name of shipper.							Net rate.	Reduction of tariff.	Account of allowances terminal expenses	
June, 1899	Tyrone	South Amboy		1,600	\$0.95	None	None	None	Morrisdale Coal Company	\$0.90	\$0.05	Unex. Contracts
									Berwind White Coal Mng. Co.	.90	.05	Unfld. Contracts
July, 1899	Tyrone	South Amboy		326	.95	None	None	None	Berwind White Coal Mng. Co.	.90	.05	Unfld. Contracts
									Morrisdale Coal Company	.90	.05	Consignees mentioned
August, 1899	Saxton	South Amboy		1,218	.95	None	None	None	Morrisdale Coal Company	.90	.05	Consignees mentioned
	Tyrone	South Amboy		*59	.95	None	None	None	Berwind White Coal Mng. Co.	.90	.05	Unfld. Contracts
				46	.95	None	None	None				
September, 1899	Altoona	South Amboy		251	.95	None	None	None	Morrisdale Coal Company	.90	.05	Consignees mentioned
	Saxton	South Amboy		51	.95	None	None	None	Berwind White Coal Mng. Co.	.90	.05	Unfld. Contracts
November, 1899	Saxton	South Amboy		1,032	.95	None	None	None	Berwind White Coal Mng. Co.	.90	.05	Unfld. Contracts
	Tyrone	South Amboy		82	.95	None	None	None	Morrisdale Coal Company	.90	.05	Unex. Contracts
December, 1899	Saxton	South Amboy		997	.95	None	None	None	Berwind White Coal Mng. Co.	.90	.05	Unfld. Contracts
	Tyrone	South Amboy		315	.95	None	None	None	Morrisdale Coal Company	.90	.05	Consignees mentioned
January, 1900	Altoona	South Amboy		1,300	.95	None	None	None	Berwind White Coal Mng. Co.	.90	.05	Unfld. Contracts
	Saxton	South Amboy		1,997	.95	None	None	None	Berwind White Coal Mng. Co.	.90	.05	Unfld. Contracts
February, 1900	Saxton	South Amboy		725	.95	None	None	None	Berwind White Coal Mng. Co.	.90	.05	Unfld. Contracts
March, 1900	Altoona	South Amboy		672	.95	None	None	None	Berwind White Coal Mng. Co.	.90	.05	Unfld. Contracts
	Saxton	South Amboy		1,570	.95	None	None	None	Berwind White Coal Mng. Co.	.90	.05	Unfld. Contracts

NOTE:

Tariff Rate is for New York Harbor (\$1.35) less allowance for Water Freight (\$0.40) for reshipment via. So. Amboy.

*Tonnage omitted in book marked "Manifest" and obtained from book called "Tidewater."

THE AUDIT COMPANY OF NEW YORK.

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CIRCUIT COURT OF THE UNITED STATES.

EXHIBIT "B"

INTERNATIONAL COAL MINING COMPANY (PLAINTIFF) VS. PENNSYLVANIA RAILROAD COMPANY (DEFENDANT).

STATEMENT OF SHIPMENTS BY THE PLAINTIFF ON THE COAL MENTIONED IN ITS STATEMENT FROM APRIL 1, 1899, TO MARCH 31, 1900, INCLUSIVE.

		Initial points mentioned in Plaintiff's statement	Destination mentioned in Plaintiff's statement.	Tonnage as per books offered to us and marked "Manifest."	Tariff rates as per coal tariffs offered to us by the Defendant.	Net rates from documents produced by Court and marked exhibits "G" and "H."	Reduction of tariff rates.	Account of Allowances.	Net rates of Plaintiff's competitors' from documents produced by Clerk of Court and marked packages "G" and "H."			
									Name of shipper.	Net rate.	Reduction of tariff.	Account of allowances terminal expenses
January, 1900	Saxton		Mechanicsville, N. Y.	142	\$1.55	None	None	None	Berwind White Coal Mining Co.	\$1.35	\$0.20	For Fthbg. R. R.
	Saxton		Mechanicsville, N. Y. (E. Somerville, Mass.)	164	1.55	None	None	None	Berwind White Coal Mining Co.	1.35	.20	For Fthbg. R. R.
February, 1900	Saxton		Albany, N. Y.	142	1.55	None	None	None				
	Saxton		Albany, N. Y.	341	1.55	None	None	None				
	Saxton		Mechanicsville, N. Y.	354	1.55	None	None	None				
March, 1900	Saxton		Danbury, Ct.	500	2.30	None	None	None				
	Saxton		Amsterdam, N. Y.	656	1.45	None	None	None				
	Saxton		Fonda, N. Y.	189	1.55	None	None	None				

THE AUDIT COMPANY OF NEW YORK.
CIRCUIT COURT OF THE UNITED STATES.

EXHIBIT "C"

INTERNATIONAL COAL MINING COMPANY (PLAINTIFF) VS. PENNSYLVANIA RAILROAD
COMPANY (DEFENDANT).

STATEMENT OF SHIPMENTS BY THE PLAINTIFF ON THE COAL MENTIONED IN ITS STATE-
MENT FROM APRIL 1, 1900, TO JULY 1, 1900.

		Initial points men- tioned in Plain- tiff's statement	Destination mentioned in Plaintiff's statement.	Tonnage as per books offered to us and marked "Manifest."	Tariff rates as per coal tariffs offered to us by the Defendant.	Net rate from docu- ments produced by Court and marked ex- hibits "G" and "H."	Reduction of tariff rate.	Account of Allow- ance.	Net rates of Plaintiff's competitors from documents produced by Clerk of Court and marked packages "G" and "H."	
									Net rates.	Reduction of tariff.
April,	1900	Saxton	South Amboy	354	\$1.30	None	None	None	\$0.95	\$0.35
May,	1900	Saxton	South Amboy	1,249	1.30	None	None	None	.95	.35
		Tyrone	South Amboy	419	1.30	None	None	None	.95	.35
June,	1900	Saxton	South Amboy	2,631	1.30	None	None	None	.95	.35

NOTE:

Tariff Rate is for New York Harbor (\$1.70) less allowance for Water Freight (\$0.40) for reshipment via. So. Amboy.
Plaintiff's competitors' names for the above "Net Rates" were Berwind Coal Mining Company, Morrisdale Coal Company,
Mitchell Coal and Coke Company, W. H. Piper and Company and Sterling Coal Company and
With the exception of Morrisdale Coal Company for May, 1900, all net rates were shown as on account of unfilled, unexpired
or overlapping contracts, the exception being "Net Rate" on account of shipments for "Anchor Line" and "Cameron Line."

NOTE:

"Net Rate" of 95 cents shown in same documents for Berwind White Coal Mining Company for shipments to Harsimus on
account of unfilled contract.

THE AUDIT COMPANY OF NEW YORK.

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CIRCUIT COURT OF THE UNITED STATES.

EXHIBIT "D"

INTERNATIONAL COAL MINING COMPANY (PLAINTIFF) VS. PENNSYLVANIA RAILROAD COMPANY (DEFENDANT).

STATEMENT OF SHIPMENTS BY THE PLAINTIFF ON THE COAL MENTIONED IN ITS STATEMENT FROM JULY 1, 1900, TO APRIL 1, 1901.

		Initial points mentioned in Plaintiff's statement	Destination mentioned in Plaintiff's statement	Tonnage as per books offered to the Defendant marked "Manifest."	Tariff rate as per coal tariffs offered to us by the Defendant.	Net rate from documents produced by Court and marked exhibits "G" and "H."	Reduction of tariff rate.	Account of Allowance.	Net rates of Plaintiff's competitors from documents produced by Clerk of Court and marked packages "G" and "H."	
									Net rates.	Reduction of tariff.
August, 1900	Saxton	South Amboy		1,697 *70	\$1.30	None	None	None	\$0.95	\$0.35
September, 1900	Cresson	South Amboy		1,253	1.30	None	None	None	.95	.35
	Saxton	South Amboy		1,008 *752	1.30	None	None	None	.95	.35
October, 1900	Cresson	South Amboy		1,813	1.30	None	None	None	.95	.35
	Saxton	South Amboy		2,044	1.30	None	None	None	.95	.35
November, 1900	Cresson	South Amboy		*205 749	1.30	None	None	None	.95	.35
	Saxton	South Amboy		1,565	1.30	None	None	None	.95	.35
December, 1900	Cresson	South Amboy		69	1.30	None	None	None	.95	.35
	Saxton	South Amboy		159	1.30	None	None	None	.95	.35
	Tyrone	South Amboy		22	1.30	None	None	None	.95	.35
January, 1901	Saxton	South Amboy		331	1.30	None	None	None	.95	.35
February, 1901	Tyrone	South Amboy		*85	1.30	None	None	None	.95	.35

NOTE:

Tariff is for New York Harbor (\$1.70) less allowance for Water Freight (\$0.40) for reshipment via. So. Amboy. Plaintiff's competitors' names for the above "Net Rates" were Berwind White Coal Mining Company in August, 1900, W. H. Piper & Company and Mitchell Coal & Coke Company in August, September and October, 1900, and Sterling Coal Company in August, 1900, to February, 1901, inclusive, and were shown as on account of "Unfilled Contracts."

"Net Rate" of 95 cents shown in same documents for Berwind White Coal Mining Company for shipments to Harsimus on account of "unfilled contracts."

*Tonnage obtained from book called "Tide Water."

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SCHEDULE B.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

1. J. Chester Wilson, being duly sworn according to law, deposes and says that he is the Secretary of the plaintiff, the International Coal Mining Company, and that the Pennsylvania Railroad Company, the defendant in the above cause, has in its possession, power and custody and control, certain statements, claims, receipts, checks, drafts, vouchers, books and other writings which contain evidence pertinent to the issue in the above case, and which it is necessary to have produced on the trial of the cause and which also it is necessary to have inspected in advance of trial if this can lawfully be done under the provisions of Section Seven Hundred and Twenty-four, 724, of the Revised Statutes of the United States.

2. This documentary evidence shows that the plaintiff, the International Coal Mining Company, was discriminated against by the defendant, the Pennsylvania Railroad Company, for the benefit of the favored shippers named in the plaintiff's statement — for the benefit of other shippers in the circumstances set forth in the plaintiff's statement by the following methods:

617 a. By the payment of rebates during the continuance of the published rates then in existence.

b. Where in particular years, to wit: 1900 and 1901, in which the published rates were increased respectively 45c. and 55c. per ton, certain favored shippers were allowed a rebate at least equalling the increase upon the ground that they were under contracts to deliver coal, which contracts called for the delivery at periods after the increase in the freight rate, which contracts are overlapping contracts. The plaintiff was forbidden to make such contracts, and during the same period of time and in the same circumstances, the favored shippers, notably the Berwind-White Coal Mining Company and the Morrisdale Coal Co., and others, were allowed to make such contracts and did pay the higher rate of the new published tariffs and were repaid the increase and more than the increase by the defendant, the Pennsylvania Railroad Company.

Excluding the overlapping contracts, the favored shippers were the Berwind-White Coal Mining Co., and affiliated companies, and the Alexandria Coal Co., the Sterling Coal Co., W. H. Piper & Co., Morrisdale Coal Co., Loyal Hanna Coal & Coke Co., Keystone Coal

& Coke Co., James L. Mitchell & Co., Mitchell Coal & Coke Co., Columbia Coal Co., David E. Williams, David E. Williams & Co., and others, and the Cresson and Clearfield Coal & Coke Company.

c. In the case of the Berwind-White Coal Mining Co., for the period covered by the plaintiff's statement, both as to dates of shipment and initial and delivery points a discrimination was practiced against the plaintiff and in favor of the Berwind-White Coal Mining Co., in the following manner: The plaintiff in shipping coal to New

618 York was obliged to ship to South Amboy from which point it was taken by water into the harbor of New York. The

defendant at the same time and in the same circumstances carried the coal of the Berwind-White Coal Mining Co. to Harsimus Pier in the Harbor of New York, and gave to the Berwind-White Coal Mining Co. the exclusive use of Harsimus Pier for the purpose of enabling Berwind-White Coal Mining Co. to acquire a monopoly of the sale of steamship coal in the New York Harbor. This result was accomplished because the exclusive use of Harsimus Pier and the handling of coal thereon was given to the Berwind-White Coal Mining Co. on such favorable terms that the plaintiff and others shipping to South Amboy could not deliver coal in New York Harbor, and even get their money back and no profit at the price fixed by Berwind-White Coal Mining Company for the delivery of coal in New York Harbor, at which price the Berwind-White Coal Mining Co. made a very large profit. All documentary evidence showing this transaction is now in the possession of the defendant, the Pennsylvania Railroad Co., and officers and agents of the Pennsylvania Railroad Co., and the officers and agents of the Berwind-White Coal Mining Co., were within a year of this time examined before the Interstate Commerce Commission in this very transaction and the documentary evidence showing the details thereof was then and there secured by the Interstate Commerce Commission from the defendant and its officers and agents, and from the officers and agents of the Berwind-White Coal Mining Co.

3. As to rebates and allowances set forth in paragraph two, subdivision- *a* and *b*, the method of obtaining rebates was as follows:

From time to time, generally monthly, the shipper presented a statement to the Railroad Company setting forth its shipments in detail, giving car numbers, numbers of tons carried
619 and shipping points, and sometimes claiming a fixed rebate, and at other times leaving that to be settled by a bargain made from time to time with J. G. Searles, Coal Freight Agent of the Pennsylvania Railroad Company, and Oscar Knipe, Auditor of Freight Receipts. At the time these statements of the shippers were handed in the Railroad Company had already in its own possession the same information, and clerks of the Railroad Co. compared the shippers' statement- with the Railroad Company's own accounts, and if they agreed, or were made to agree by mutual adjustment, the auditor of coal freight receipts fixed the amount of the rebate and the same was paid by check to J. G. Searles, Coal Freight Agent. A part of the documentary evidence consisted of letters from the coal freight agent's department to the department of the Auditor of coal freight

receipts, of which press copies were kept which accompanied the statements to the accounting department, and the coal freight agent's department also kept a press copy of a memorandum of a slip that accompanied a check for the rebate when it was sent to the shipper, and the entire transaction was evidenced by book or books and other writings, and the check was drawn for the amount appearing on these books and writings, and was signed by either the auditor of coal freight receipts, or by some other person for the Railroad Company, and then was countersigned by J. G. Searles, coal freight agent, and was then given to the shipper whoever he was. In this matter in addition to the statements of shipments made by the shipper to the Railroad Company and the statements in the hands of the Railroad Company, the rebates paid were evidenced by other documentary proof.

a. The written communications between the coal freight agent and the auditor of coal freight receipts, copies of which are kept in letter books.

620 b. The checks for the rebates paid to shippers. These were countersigned by the comptroller, the auditor of coal freight receipts and the coal freight agent, and each of these departments kept a permanent record of these checks which came back to the Railroad Company and the stubs of the check books furnished further information in regard thereto, so that the transactions can all be traced through documentary evidence in the hands of the defendant, the Pennsylvania Railroad Company.

4. In the case of the International Coal Mining Company vs. the Pennsylvania Railroad Company in the Court of Common Pleas No. 2, of Philadelphia County, March term, 1901, No. 362, which was tried before Judge Wiltbank in October, 1904, the rebate papers similar to the above-mentioned extending back to April 1, 1898, were produced on trial by the Railroad Company.

This was used to recover over-paid freight charges on shipments made within the State of Pennsylvania, and the documentary evidence was precisely as hereinbefore detailed, and this evidence showed the payment of rebates to David E. Williams & Co., on shipments in April, May, June and July, 1900, and April, 1898, to March 31, 1899, and April, May and June, 1899, to Berwind-White Coal Mining Co., in April, May, June and July of 1899, and April, May and June, July and August, 1900, and to the Sterling Coal Co., March 31, 1899, and April, 1899, to April, 1900, and to the Loyal Hanna Coal & Coke Company, April 9, to November 30, 1898, April 1, 1899, to January 31, 1900, and in February and March, 1900, and to the Morrisdale Coal Company, April, 1898, to March 31, 1899, and in April and May, 1899, and June and July, 1899, and July, August and September and December, 1899, and May, April, June and July, 1900.

In the said suit in the Court of Common Pleas No. 2, of Philadelphia County, the evidence shows that the shipments made by the above-named shippers who got rebates, were made between the same points within the State of Pennsylvania as the shipments made by the International Coal Mining Company

Co., the subject of the said litigation, and the evidence thus produced is in point of time of shipments covered by the plaintiff's statement in this present cause now pending in this Honorable Court, and the affiant avers, that during the same periods of time covered by the claims of the International Coal Mining Company, in this suit now pending in this Honorable Court, the above-named other shippers did receive rebates from the Pennsylvania Railroad Company on interstate shipments between the same points as the plaintiff's shipments, and that these shippers did present similar claims and had made to them allowances by the Pennsylvania Railroad Company similar to those proven by the documentary evidence produced on call by the said Railroad Company on the trial before Judge Wiltbank, in October, 1904, and the plaintiff's claim in this suit is in this Honorable Court to October Sessions, 1904, No. 69. The affiant further says that the Pennsylvania Railroad Company has in its possession the documentary evidence showing the payment of said rebates to said shippers as hereinbefore mentioned as to the said interstate shipments made by the same favored shippers (and others) between the same points and at the same time as the plaintiff shipments for which it was overcharged as set forth in the plaintiff's statement in this cause.

J. CHESTER WILSON.

Sworn to and subscribed by said J. Chester Wilson this 24th day of January, 1907.

FRANK R. BUCHANAN,
Notary Public.

[SEAL.]

Commission expires March 12, 1909.

622 (Endorsed: 69 April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Co. vs. Pennsylvania Railroad Co. Rule on defendant for production of papers, etc., on trial retble. February 13th, 1907. Filed, Jan. 30, 1907. Henry B. Robb, Clerk.)

This indenture, made the first day of March, one thousand eight hundred and eighty-nine, between The Pennsylvania Railroad Company, hereinafter called the Lessors, of the one part, and The Berwind-White Coal Mining Company, hereinafter called the Lessees, of the other part:

Whereas, The said Lessors being desirous of increasing the terminal facilities for handling bituminous coal in the Bay and Harbor of New York, has found that the same could be most economically done, both as to movement and expense, by, as far as possible concentrating the stocks of the larger shippers at single points, and to carry this purpose out, has arranged with the said Lessees who are greatly the largest shippers of coal to said points, to lease to them a certain strip or piece of land hereinafter described, upon which the necessary improvements were to have been erected at the expense of the said Lessees, with the obligation on the part of the Lessors to take the same at the expiration of the term of such lease,

the said Lessees deeming the advantages to accrue to them from concentration of their business sufficient to justify the expenditure under the terms hereinafter written.

And whereas, In view of the fact that the improvements were to have been made upon the real estate of the said Lessors, and afterwards, on termination of the lease, to become absolutely the property of the Lessors, the said Lessors have preferred to themselves construct the same, so as to secure a satisfactory result,
623 both as to manner and material of construction, and have this date completed the same at the cost of Sixty thousand one hundred and fifty dollars.

Witnesseth, That the said Lessors for and in consideration of the premises and of the rent and covenants and agreements hereinafter mentioned, which, on the part of the said Lessees, are to be paid, kept and performed, have demised and let, and by these presents do demise and let unto the said Lessees, the following described premises, viz: All that certain strip or piece of land with the trestle work and appurtenances thereon constructed, situate on the southern side of the pier know as the "Abattoir Pier," in the City of Jersey City and State of New Jersey, beginning at the bulkhead line as now constructed and extending eastward along the southern side of the said pier the width of twenty-six feet and the length of one thousand one hundred and twenty-five feet; the southern line of the said pier being one hundred and thirty-one feet southward from the southern line of Sixth Street produced. Together with the improvements thereon erected. To hold the said premises for and during the term of three years from the first day of March, one thousand eight hundred and eighty-nine, and thereafter until the expiration of ninety days' notice as hereinafter mentioned. Either party shall have the right to terminate this lease at any time during the said term of three years or thereafter in case the Lessees shall hold over after said term upon giving ninety days' written notice to the other party of their intention so to do, and at the expiration of the said notice this lease shall absolutely determine, and the said Lessees shall quit and deliver up possession of the said premises and pay to the said Lessors the proportionate part of the said rent to the time of the expiration of said notice; at and for the rent or sum of one thousand eight hundred dollars per year, to be paid in equal semi-annual payments on the first day of the months
of March and September in each year during the continuance of this lease, the first payment to be made on the
624 first day of September, 1889.

The said Lessees hereby covenant and agree with the Lessors as follows, viz:

That they will pay to the Lessors the rent hereby reserved on the days and times hereinbefore mentioned for the payment thereof, and will also pay as the same becomes payable all sums for gas consumed on or in the said premises during the continuance of this lease, and will at their own expense maintain the said land and improvements thereon constructed and keep the said premises in good order and condition during the continuance of this lease, and at the end of the

said term, or other sooner determination of this lease, peaceably deliver up possession of the said premises in the like good order and condition, ordinary wear and tear only excepted, and shall also at their own expense, do the dredging necessary to maintain the proper depth of water for the use of the wharves and docks on or about the said land.

That they will not under penalty of forfeiture of this lease do or commit, or suffer to be done or committed, any act or thing whereby or in consequences whereof the conditions or stipulations of the policy or policies of insurance on the said premises shall become avoided or suspended, or occupy or permit to be occupied the said premises otherwise than for handling bituminous coal in the Bay and Harbor of New York.

That they will not assign this lease, or the term hereby created or underlet the said premises, or any part thereof without the written consent of the Lessors endorsed hereon; an assignment within the meaning of this lease being understood and intended to comprehend not only the voluntary action of the Lessees, but also every levy or sale on execution, or other legal process, and every assignment or sale in bankruptcy or insolvency, or under any other compulsory procedure or order of Court.

625 It is hereby further agreed by and between the above named Lessors and Lessees as follows:

First. The said Lessees shall pay to the said Lessors, upon the execution of these presents, the sum of Sixty thousand one hundred and fifty dollars, in full for the cost of the improvements constructed upon the said land by the said Lessors as aforesaid.

Second. The said Lessees shall ship to the said land coal averaging thirty-five thousand tons per month or to the full extent of the capacity of the said strip or piece of land, and the improvements thereon, and all their coal destined to and handled on the said land and improvements shall be shipped over the lines of the railroads of the said Lessors, and also that they, the said Lessees, shall not handle on said land and the improvements thereon the coal of any other party or parties than themselves, without the written consent of the said Lessors.

Third. The said Lessors shall upon the termination of this lease repay to the said lessees the said sum of Sixty thousand one hundred and fifty dollars in full for the cost of the aforesaid improvements constructed upon the said land as aforesaid; and shall also repay to the said Lessees the cost of any additional improvements that shall be placed upon the said land by the said Lessees with the consent and approval of the said Lessors, unless the improvements or a portion thereof shall be destroyed by causes other than those incident to ordinary wear and tear, in which event a proportionate reduction shall be made in the amount to be paid by the said Lessors to the said Lessees, and upon such payment being made for the said improvements the same shall become the absolute property of the said Lessors.

626 And that the rights and liabilities herein given to or imposed upon either of the parties hereto shall extend to the successors and assigns of each party, as though they were in

each case named, unless where the assigns are expressly excluded from certain rights.

In Witness Whereof, The said Lessors and Lessees have caused their respective corporate seals to be hereto affixed, duly attested, the day and year first above written.

THE PENNSYLVANIA RAILROAD COMPANY,

By FRANK THOMSON, *Vice-President*.

Attest:

[SEAL.] JNO. C. SIMS, JR., *Secretary*.

THE BERWIND-WHITE COAL MINING COMPANY,

By CHAS. T. BERWIND, *President*.

Attest:

[SEAL.] H. A. BERWIND, *Secretary*.

Sealed and delivered in the presence of

ROBT. H. GROFF.

F. McOWEN.

Whereas, By Indenture dated the first day of March, A. D. eighteen hundred and eighty-nine, The Pennsylvania Railroad Company did demise and let unto The Berwind-White Coal Mining Company all that certain strip or piece of land with the trestle work and appurtenances thereon constructed, situate on the southern side of the pier known as the "Abattoir Pier" in the City of Jersey City, and

State of New Jersey, beginning at the bulkhead as then constructed and extending eastward along the southern side of the said pier the width of twenty-six feet and the length of one thousand one hundred and twenty-five feet, the southern line of the said pier being one hundred and thirty-one feet southward from the southern line of Sixth street produced, together with the improvements thereon erected. To hold the said premises for the term of three years from the date thereof, subject to certain stipulations, conditions and covenants and agreements in said Indenture mentioned, as will fully appear from reference thereto.

And whereas, The business of the said Lessees having increased to such an extent that the facilities for shipping coal, as described and let in said Indenture, are now greatly inadequate, and the said Lessors have at the cost of Forty-three thousand three hundred and ten dollars and twenty-one cents constructed an extension of the trestle work and appurtenances above mentioned upon the land hereinafter described;

Now this supplemental indenture, made the — day of —, A. D. 1901, between The Pennsylvania Railroad Company, hereinafter called Lessors of the one part, and The Berwind-White Coal Mining Company, hereinafter called Lessees of the other part,

Witnesseth, That the said Lessors for and in consideration of the premises and of the rent, covenants and agreements in said above recited Indenture mentioned, which are part hereof and are

to have the same force and effect and on the part of the said Lessees are to be kept and performed as if the same were incorporated herein, have demised and let and by these presents do demise and let unto the said Lessees the following described premises, viz: All that strip or piece of land covered with water situated on the southern side of the pier known as the "Abattoir Pier," in the City of
 628 Jersey City and State of New Jersey, beginning at the end of the pier constructed on the above described strip or piece of land and extending eastward the length of four hundred and ten feet, the two hundred and fifty-three feet thereof next the said pier being of the width of fifty-five feet and the remaining one hundred and fifty-seven feet thereof being of the width of forty feet. The southern line of this strip of land being one hundred and thirty-one feet southward from the southern line of Sixth Street produced.

To hold the said premises as tenants at will of the said Lessors under all stipulations and conditions as to notice and other provisions as in said Indenture is fully set forth, so that this lease shall and will terminate at the time as the above mentioned Indenture.

The said Lessees hereby covenant and agree with the said Lessors that upon the execution hereof they, the said Lessees, shall pay to the said Lessors the said sum of Forty-three thousand three hundred and ten dollars and twenty-one cents in full for the cost of the improvements constructed upon the said land by the said Lessors as aforesaid, and that they will fully keep and perform all the covenants and agreements mentioned in said Indenture, as well in respect to the strip of land last above described as to the strip of land described therein.

The said Lessors hereby covenant and agree with the said Lessees that all the agreements and conditions relative to the repayment of the Sixty thousand one hundred and fifty dollars in above recited Indenture mentioned, shall apply to the repayment of the said sum of Forty-three thousand three hundred and ten dollars and twenty-one cents, as if the same were herein incorporated.

In witness whereof, The said Lessors and Lessees have
 629 caused their corporate seals to be hereunto affixed, duly attested, the day and year first above mentioned.

THE PENNSYLVANIA RAILROAD COMPANY,

By ———, *President.*

Attest:

———, *Secretary.*

THE BERWIND-WHITE COAL MINING COMPANY,

By ———, *President.*

Attest:

———, *Secretary.*

Sealed and delivered in the presence of us:

———,
 ———.

Counsel for the defendant excepted, inter alia, as follows:

"Mr. GOWEN: Your Honor will allow us an exception to the refusal of our points, and also to that portion of your charge in which you said that when the defendant establishes rates from one district, that it is to be conclusively presumed against it, that all the services rendered by it in transporting from that district are like and similar. I presume your Honor intended that instruction to cover the shipments made over the Huntingdon and Broad Top Railroad, although you did not specifically deal with that feature of the case."

"The COURT: I understood there were not any Huntingdon and Broad Top shipments claimed here." (Charge of the Court, page 16.)

The part included within the said exception is the following:

630 "Under the Interstate Commerce Act transportation companies are required to publish their rates from certain points to certain points, and it has been the practice of the transportation companies throughout the country to designate certain districts as the initial point, and the Interstate Commerce Commission has permitted that to be done, because it would be impossible for a transportation company to schedule every small station or by-way from which it transports its commerce. If Philadelphia is the initial point, it may be that Camden, Norristown, Doylestown, West Chester and other neighboring places may be taken in a particular district as part of the initial point. I do not say that is the case, but the railroad companies are permitted to take in a scope of country as an initial point, and the Interstate Commerce Commission has said that is a compliance with the law, and when a railroad company does take in a district as an initial point from which to ship its goods and schedules that in its tariff rates as an initial point or district from which it is transporting merchandise, it is conclusive evidence against the railroad company that as to all merchandise and property of like kind from that particular district the service is, as to the initial point, a like service under substantially similar circumstances and conditions. That is to say, so far as the starting point is concerned, the services are rendered under similar circumstances and conditions. All the Clearfield district, as designated in these tariff schedules, is on the same footing. Any man shipping coal out of the Clearfield district, if he ships to the same destination under similar circumstances, it makes no difference where he loads his coal in the Clearfield District is, receiving only a like service under substantially similar circumstances and conditions." (Charge of the Court, pages 5 and 6.)

Counsel for defendant excepted, inter alia, as follows:

631 "Mr. GOWEN: I desire to take an exception to the submission to the jury of the question whether there is any evidence that this point was in the Clearfield Region." (Charge of the Court, page 17.)

The part included within said exception is the following:

"The COURT: Gentlemen of the Jury, it is contended by the defendant that all the shipments made by the plaintiff during this time, starting from the Huntingdon and Broad Top Railroad, were

not in the Clearfield District, and that the evidence does not show that they were in the Clearfield District, and for that reason they were not a like service rendered under substantially similar conditions and circumstances. The plaintiff contends that the shipments on the Huntingdon and Broad Top Railroad and the point of shipment from which the plaintiff shipped its coal on that road, are in the Clearfield District, and that the evidence in this case shows that they were treated as being in the Clearfield District. You will say which is correct. You will say whether the evidence shows it is in the district or is not in the district. If it is in the district, the shipments from that point would be from the same initial point. If it is not in the district they would not be from the same initial point. It is a matter for you." (Charge of the Court, pages 16 and 17.)

And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said Court, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the record:

The said counsel for the said defendant did then and there tender this Bill of Exceptions to the opinion of the said Court, and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge, at the request

632 of the said counsel for the defendant, did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided, this eighth day of June, 1908.

JAMES B. HOLLAND. [SEAL.]

(Endorsed: Circuit Court of the United States. East. Dist., Pa. April Term, 1904. No. 69. Bill of Exceptions. International Coal Mining Company vs. The P. R. R. Co. Bill presented. J. B. H., J. 6-1-'08. Filed July 24, 1908. Henry B. Robb, Clerk. Per B. Sellers & Rhoades, for Def't.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Plaintiff moves for a new trial and assigns the following reasons therefor:

1. The charge of the Court was against the law.
2. The Court erred in not charging the jury that the plaintiff was entitled to recover the claim for 25 cents a ton as a discrimination against the plaintiff on all its shipments by reason of the commercial advantages accorded to Berwind-White Coal Mining

Company by the defendant at the expense of the plaintiff's shipments.

633 3. The Court erred in not charging the jury that the plaintiff was entitled to recover on the claim made by reason of the allowance to the Altoona Coal & Coke Company of 18 cents per ton on shipments from Kittanning to points east of Altoona and Bellwood.

4. The Court erred in declining to permit the plaintiff to cross-examine John P. Green, its Vice-President, and Robert H. Groff, its Assistant Secretary, against the answer of the defendant to the rule to show cause why shippers' statements should not be produced granted May 13th 1908.

5. The Court erred in making the ruling hereunder quoted from stenographer's notes of testimony, pages 283-4:

Mr. NEWLIN: Now, I make a further call under the call that is on the notes of April 29, for other matters than the statements of shippers which have just been disposed of.

The COURT: What is the call?

Mr. NEWLIN: I ask for the production now of all documentary evidence showing the payment of the 15 cents a ton back to Berwind, White & Co., so that I will see the details of that and the subject matter included.

The COURT: As Mr. Berwind swore that they did not possess any such papers, and as he admitted the receipt of it, stating that it was for carrying coal from the pier to the boats, as alleged by the plaintiff, the request is refused.

(Exception to plaintiff.)

Mr. NEWLIN: I am asking for this under the rule to produce—not under an ordinary call.

634 The COURT: I understand that. In order to avoid any loss of time, I will state that the Court refuses to order the production of any other papers whatever in this case, for the reason that the defendant had already produced all the papers which bear directly on the issues raised in this case.

(Exception to plaintiff.)"

6. The Court erred in holding that the defendant had sufficiently excused its non-production of the documentary evidence covered by the order of April 2nd, 1907, the possession of which papers was never denied on oath before the making of the order of April 2nd, 1907, or since that time on the trial of the cause and the matter held to be an excuse consisted simply of the verbal unsworn statements of Francis I. Gowen, which the Court refused to strike from the record on the objection of the plaintiff.

7. The Court erred in refusing the plaintiff's motion for a default judgment stenographer's notes page 328, which reads as follows:

"Mr. Newlin now moves for judgment by default against the defendant for failure to produce the documentary evidence specified in the order of April 2nd, 1907, on the rules to produce therein referred to.

(Motion for judgment by default overruled. Exception noted for plaintiff.)"

8. The Court erred in declining to permit the plaintiff to show that the allowance to Berwind, White & Company of 35 cents for terminal expenses at Harsimus Pier was excessive and was all illegal because the boat service was by barges belonging to said Company and constituted a part of its plant.

9. The Court erred in declining to permit the plaintiff to show that the allowance made by the defendant to Berwind-White Coal Mining Company of 15 cents a ton for handling its own coal on Harsimus pier was excessive.

635 10. The Court erred in charging the jury that the plaintiff could not recover for discriminations against the plaintiff practiced in any year in which the plaintiff had itself received a partial return from the Railroad Company on its freight paid.

JAMES W. M. NEWLIN,

For Plaintiff.

May 23, 1908.

(Endorsed: No. 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Company vs. Pennsylvania Railroad Company. Plaintiff's motion for a new trial and reasons therefor. Newlin. Filed May 25, 1908, Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Defendant's Motion for Extension of Time for Filing Motion and Reasons for New Trial.

Before HOLLAND, J.:

And now, May 26, 1908, upon motion of Sellers & Rhoads, attorneys for The Pennsylvania Railroad Company, defendant
636 in above suit, the time for filing motion and reasons for new trial is extended until June 5th, 1908.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

(Endorsed: Apr. Sess., 1904, C. C. U. S. East Dist. Pa. International Coal Mining Co. v. P. R. R. Co. Motion for extension of time for filing motion and reasons for new trial. Sellers & Rhoads, for motion. Filed May 26, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Motion Upon Behalf of Defendant for a New Trial.

The defendant moves the Court to grant a new trial, and assigns the following reasons therefor:

1. The Court erred in not charging the jury as requested in defendant's first point, which said point was as follows:

"There is no evidence that the plaintiff was charged or paid a rate of freight on its shipments made between July 29, 1898, 637 and April 1st, 1899, greater than was charged to and paid by other shippers to the same destinations and as to its shipments made between these dates the plaintiff is not entitled to recover anything from the defendant."

2. The Court erred in not charging the jury as requested in defendant's second point, which said point was as follows:

"There is no evidence that shipments of other shippers made after April 1st, 1899, were carried by the defendant to destinations to which the plaintiff was shipping at lower freight rates than it charged the plaintiff on its shipments to such destinations, except certain shipments made by other shippers embracing coal which had been sold by such other shippers prior to April 1st, 1899, under contract deliveries under which were required to be made after April 1st, 1899."

3. The Court erred in not charging the jury as requested in defendant's fourth point, which said point was as follows:

"If the jury believe that it would tend to the benefit of its shippers and would also tend to secure for it a larger volume of business, the carrier is not guilty of discrimination forbidden by the Interstate Commerce Act, because it carries at rates of freight in force at the time such contracts were entered into, coal embraced in and shipped under contracts extending for a period of time, even though at the same time it may be charging a higher rate on coal not covered by or embraced in contracts of such a character, provided it extends the benefit of the lower rates to all shippers having such contracts, and shipping coal thereunder."

638 4. The Court erred in not charging the jury as requested in defendant's fifth point, which said point was as follows:

"The burden is upon the plaintiff to prove that the service rendered by the defendant in the transportation of the coal for other shippers on which it charged a lower rate was a like service to that which it rendered the plaintiff. As to the plaintiff's shipments which originated on the line of the Huntingdon & Broad Top Rail-

road the service performed by the defendant in transporting these shipments was not a like service to that which it performed in transporting shipments originating on its own lines, and hence the plaintiff cannot recover as to any of its shipments which originated on the Huntingdon & Broad Top Railroad."

5. The Court erred in not charging the jury as requested in defendant's sixth point, which said point was as follows:

"The evidence discloses the fact that South Amboy and Harsimus were not the ultimate points of destination of the coal shipped to those points by the plaintiff and other shippers, the ultimate destination of all such coal being points and places beyond. The plaintiff has not shown to what points the coal carried by the defendant for its account to South Amboy was destined, and has not shown that any of the coal transported by the defendant at lower rates to South Amboy and Harsimus went to the same destination as its coal. The plaintiff is not, therefore, entitled to recover anything on account of the shipments carried for its account by the defendant to South Amboy."

6. The Court erred in not charging the jury as requested in defendant's seventh point, which said point was as follows:

639 "The plaintiff is not entitled to recover on all its shipments made in any one month or period of time because of the fact that during such time the defendant transported at a lower rate than it charged the plaintiff a portion of the shipments of some other shipper. If such lower rate was not justified the amount which the plaintiff is entitled to recover is measured by the difference between the rate per ton which it paid on all its shipments during such period and the rate per ton which the other shipper paid on his or its whole volume of shipments during such period.

"As there is no evidence from which the jury can estimate the rate per ton paid on all their shipments by the shippers, a portion of whose shipments were carried at lower rates than were charged the plaintiff, there is no basis upon which to estimate the amount which the plaintiff is entitled to recover, and it is only, therefore, entitled to recover nominal damages."

7. The Court erred in not charging the jury as requested in defendant's eighth point, which said point was as follows:

"The evidence establishes the fact that the plaintiff itself did not pay the freights a portion of which it now claims a right to recover. Payment of these freights, as the evidence shows, was made by those who purchased the coal from the plaintiff on which the freights were paid.

"In order to entitle the plaintiff to recover it must have established to your satisfaction that under the terms of sale of this coal it, and not the purchasers, would have received the benefit of any reduction in the rate. The only evidence as to the terms of sale is that given by Mr. Wilson. The credibility of his testimony is for you to consider. If you are not satisfied to accept it as true, the plaintiff cannot recover. In considering the credit which
640 you should give to Mr. Wilson's testimony on this point, it is due to the defendant that you should take into account the

fact, if it be a fact, that the testimony of Mr. Wilson on other points or the statements embodied in the record of this case which he has sworn to, have been shown to have been either false or inaccurate, and that you should further consider whether any circumstance has been established which fairly excuses the non-production by the plaintiff of its books showing the character of the transactions between itself and the purchasers of the coal."

8. The Court erred in not charging the jury as requested in defendant's ninth point, which said point was as follows:

"As it appears from the evidence that the plaintiff since April, 1899, or shortly thereafter, became conversant with the fact that the defendant was carrying at lower rates coal shipped under what has been referred to in the case as unfilled or overlapping contracts, the subsequent payment by it of the rates charged by the defendant on the coal carried for its account, if, in point of fact, such payments were made by it or on its account, without protest of any sort against the right of the defendant to charge and collect the rate which it was thus required to pay, debars it from maintaining any action to recover any part of the freight thus paid."

9. The Court erred in not charging the jury as requested in defendant's tenth point, which said point was as follows:

"To entitle the plaintiff to recover anything in excess of nominal damages as to its shipments made after April 1st, 1899, the jury must be satisfied that it sustained some loss or injury due to 641 the fact that the defendant was carrying at the same time at lower rates coal shipped by other shippers. The plaintiff has not shown that it did sustain any such loss or injury, and it is entitled, therefore, to recover only nominal damages, even if the carriage at such lower rates for other shippers by the defendant was not justified."

10. The Court erred in not charging the jury as requested in defendant's eleventh point, which said point was as follows:

"Under all the evidence in the case the plaintiff is only entitled to recover nominal damages, and your verdict should accordingly be only for such an amount."

11. The Court erred in not charging the jury as requested in defendant's twelfth point, which said point was as follows:

"Under all the evidence in the case the plaintiff is not entitled to recover, and your verdict must be for the defendant."

12. The Court erred in charging the jury as follows:

"Under the Interstate Commerce Act transportation companies are required to publish their rates from certain points to certain points, and it has been the practice of the transportation companies throughout the country to designate certain districts as the initial point, and the Interstate Commerce Commission has permitted that to be done, because it would be impossible for a transportation company to schedule every small station or by-way from which it transports its commerce. If Philadelphia is the initial point, it may be 642 that Camden, Norristown, Doylestown, West Chester, and other neighboring places may be taken in a particular district as part of the initial point. I do not say that is the case, but

railroad companies are permitted to take in a scope of country as an initial point, and the Interstate Commerce Commission has said that is a compliance with the law, and when a railroad company does take in a district as an initial point from which to ship its goods and schedules that in its tariff rates as an initial point or district from which it is transporting merchandise, it is conclusive evidence against the railroad company that as to all merchandise and property of like kind from that particular district the service is, as to the initial point, a like service under substantially similar circumstances and conditions. That is to say, so far as the starting point is concerned, the services are rendered under similar circumstances and conditions. All the Clearfield district, as designated in these tariff schedules, is on the same footing. Any man shipping coal out of the Clearfield district, if he ships to the same destination under similar circumstances, it makes no difference where he loads his coal in the Clearfield district, is receiving only a like service under substantially similar circumstances and conditions."

13. The Court erred in charging the jury as follows:

"When they put on their schedule a certain rate from certain points to certain points, that is what they are required to collect from everybody who is shipping while that schedule is in effect. It is contended by the defendant that if shippers have overlapping contracts they can be classified. The Interstate Commerce Act authorizes the classification of commerce. You can ship coal for one price per ton, iron pipe for another, and pig iron for another. In other words,

643 there is a classification of commerce. Whether they could classify overlapping contracts, schedule them and make them public, or not, is not a question in this case, but it is a question whether or not, when they schedule a certain figure for the transportation of property from one point to another, as their tariff rate, and make that public, they are bound by it, and the law is that they cannot have a private agreement, overlapping or not overlapping, which gives a competitor, during the contemporaneous shipments, a return or an advantage over the published rate."

14. The Court erred in charging the jury as follows:

"It is contended by the defendant that all the shipments made by the plaintiff during this time starting from the Huntingdon and Broad Top Railroad, were not in the Clearfield district, and that the evidence does not show that they were in the Clearfield district, and for that reason they were not a like service rendered under substantially similar conditions and circumstances. The plaintiff contends that the shipments on the Huntingdon and Broad Top Railroad and the point of shipment from which the plaintiff shipped its coal on that road, are in the Clearfield district, and that the evidence in this case shows that they were treated as being in the Clearfield district. You will say which is correct. You will say whether the evidence shows it is in the district or is not in the district. If it is in the district, the shipments from that point would be from the same initial point. If it is not in the district they would not be from the same initial point. It is a matter for you."

15. The Court erred in charging the jury as follows:

644 "It is contended by the defendant that Saxton, on the Huntingdon and Broad Top Railroad, is not within the Clearfield district, and they say that there is evidence to establish that. What it is you will recall, if there is such evidence, and if you find that there is evidence to show that it is not within the Clearfield district then you will say whether or not a shipment from Saxton is a shipment from a point which makes the service a like service rendered under substantially similar conditions and circumstances. If you find that it is not such a service, then of course all the shipments that were sent by the plaintiff from Saxton were out of the calculation. The plaintiff says that shipments on the Huntingdon and Broad Top Railroad are within the Clearfield district, that all these letters of transmittal of the defendant trace them as within the Clearfield district, and that one of the witnesses swore that Saxton was in the district. Mr. Wilson said it was in the district. You will say what credit you give to his testimony in view of what the defendant says he swore to at different times. But, at any rate, the plaintiff says that there is evidence here to show from the defendant's own letters that the Huntingdon and Broad Top Railway is in the Clearfield district. If you find it is within the Clearfield district, then all the shipments from Saxton would be in."

16. The verdict was against the evidence.

17. The verdict was against the weight of the evidence.

18. The verdict was against the law.

SELLERS & RHOADS,
Counsel for Defendant.

(Endorsed: No. 69. April Term, 1904. C. C. U. S. E. D.
645 Penna. International Coal Mining Company vs. The Pennsylvania Railroad Company. Motion of defendant for new trial and reasons therefor. Sellers & Rhoads. Filed June 1, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

And now, June 9th, 1908, comes the plaintiff, the International Coal Mining Company, by its attorney, James W. M. Newlin, and excepts to the sealing of the defendant's bill of exceptions because against the objection of the plaintiff the Court inserted in the bill of exceptions two exceptions to the charge of the Court which were not made before the jury left the bar and were only presented to the Court by the defendant on June 1st, 1908, as part of the reasons for a new trial, which reasons were too late because the verdict was rendered May 23rd, 1908, and the time for filing reasons for a new trial was extended by ex parte order without jurisdiction.

Upon the sealing of the bill the Court allowed this exception.

The stenographer's notes show the making of certain exceptions by the defendant to the charge of the Court which were regularly made at the trial immediately after the charge and before the jury had left the bar and the additional matter brought into the bill of exceptions is forbidden by Rule X, Section 3, page 646 77 of the Rules of the Circuit Court of the United States for the Eastern District of Pennsylvania:

"SECTION 3. All exceptions to the charge of the Court shall be specified in writing, immediately on the conclusion of the charge, and handed to the Court before the jury leaves the bar."

The matter erroneously inserted in the defendant's bill of exceptions consists in adding to the defendant's exceptions taken at the trial and appearing on the stenographer's notes of the trial which are included in the defendant's bill of exceptions the following two paragraphs which are worked into the defendant's bill of exceptions as if they were part of what occurred at the trial:

The part included within the said exceptions is the following:

"Under the Interstate Commerce Act transportation companies are required to publish their rates from certain points to certain points, and it has been the practice of the transportation companies throughout the country to designate certain districts as the initial point, and the Interstate Commerce Commission has permitted that to be done, because it would be impossible for a transportation company to schedule every small station or by-way from which it transports its commerce. If Philadelphia is the initial point it may be that Camden, Norristown, Doylestown, West Chester, and other neighboring places may be taken in a particular district as part of the initial point. I do not say that is the case, but railroad companies are permitted to take in a scope of country as an initial point, and the Interstate Commerce Commission has said that is a compliance with the law, and when a railroad company does take in a district as an initial point from which to ship its goods and schedules that in its tariff rates as an initial point or district from which it is transporting merchandise, it is conclusive evidence against the railroad company that as to all merchandise and property of like kind from that particular district the service is, as to the initial point, as like service under substantially similar circumstances and conditions. That is to say, so far as starting point is concerned, the services are rendered under similar circumstances and conditions. All the Clearfield district, as designated in these tariff schedules, is on the same footing. Any man shipping coal out of the Clearfield district, if he ships to the same destination under similar circumstances, it makes no difference where he loads his coal in the Clearfield district, is receiving only a like service under substantially similar circumstances and conditions." (Charge of the Court, pages 5 and 6.)

The part included within said exception is the following:

"The COURT: Gentlemen of the jury, it is contended by the defendant that all the shipments made by the plaintiff during this time, starting from the Huntingdon and Broad Top Railroad, were

not in the Clearfield district, and that the evidence does not show that they were in the Clearfield district, and for that reason they were not a like service rendered under substantially similar conditions and circumstances. The plaintiff contends that the shipments on the Huntingdon and Broad Top Railroad and the point of shipment from which the plaintiff shipped its coal on that road, are in the Clearfield district, and that the evidence in this case shows that they were treated as being in the Clearfield district. You will say which is correct. You will say whether the evidence shows it is in the district or is not the district. If it is in the district, the shipments from that point would be from the same initial point. If it is not in the district they would not be from the same initial point. It is a matter for you."

(Charge of the Court, pages 16 and 17.)

No exception was taken at the trial to any portion of the Judge's charge now specifically set forth as above quoted from the defendant's bill of exceptions.

JAMES W. M. NEWLIN,
For Plaintiff, Exceptant.

(Endorsed: No. 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Company vs. Pennsylvania Railroad Company. Exception to sealing of defendant's bill of exceptions. Newlin. Filed June 10, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Overruling Motions and Reasons for a New Trial.

HOLLAND, J.:

This was a suit instituted in the United States Court against the defendant for an unlawful discrimination, and the jury rendered a verdict in favor of the plaintiff for the sum of \$12,-013.51. In due time both plaintiff and defendant filed motions and reasons for a new trial. Neither the plaintiff's nor the defendant's reasons for a new trial will be considered seriatim. The reasons for the particular rulings of the Court objected to by the plaintiff and which are now made reasons for a new trial by it, appear upon the record, and we think in every case justifies the view taken by the Court.

One of the plaintiff's reasons assigned was the defendant's failure to produce certain documents called for at the trial, and the Court's

refusal to give judgment against the plaintiff for default. The defendant produced all the books necessary to enable the plaintiff to prove all the facts alleged in its statement, and in fact admitted the payment of the amounts to the plaintiff's competitors in the coal business which the plaintiff alleged were paid by way of rebates, so that there was no necessity for the further production of books or papers.

The other reasons of the plaintiff for a new trial we do not think need to be discussed, with the exception of the tenth, which is as follows:

"The Court erred in charging the jury that the plaintiff could not recover for discriminations against the plaintiff practiced in any year in which the plaintiff had itself received the partial return from the railroad company on its freight paid."

The evidence showed that the plaintiff had been a persistent solicitor for rebates and had received certain re-payments with all its competitors up to about April 1st, 1899. Subsequent to this date, it was as persistent in demanding rebates as any of its competitors, but for some reason received none, and this continued during the balance of the time covered by the plaintiff's statement. The

650 Court refused to permit the plaintiff to recover against the railroad company for the period during which it was engaged in the violation of the law to the same extent as its competitors, although at the trial it claimed that while it was violating the law in inducing the railroad company to give it a rebate, yet its complaint was that it had not succeeded in forcing out of the railroad as much as its competitors were able to get, and asserted the right to recover the difference. The claim of the plaintiff in this regard is, to say the least, so obviously improper that the mere statement of the facts is sufficient, in our judgment to show that the ruling was entirely right in refusing to permit the courts to be used in an effort to make an even division of what may be called commercial graft.

The reasons assigned for a new trial by the defendant are all exceptions either to the charge of the Court or to the refusal of the Court to instruct the jury, as requested, in certain points submitted. All the important questions raised in the reasons assigned for a new trial were very elaborately argued at the trial and patiently considered by the Court. After a re-examination of the position then taken in regard to these questions, we are unable to discover any error in the Court's charge or refusal to charge as requested. The charge fully covers all the points now raised, and we still think the law as applied to the facts in this case is therein correctly stated.

The motions and reasons for a new trial filed both by the plaintiff and defendant are overruled and a new trial refused.

(Endorsed: 69. Apr. S., 1904. International Coal Mining Co. vs. Pennsylvania Railroad Co. Opinion, Holland, J., refusing motions for new trial. Filed July 17, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

- 651 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Term, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

The Clerk will enter judgment for plaintiff on the verdict herein.

JAMES W. M. NEWLIN,
Att'y for Plff.

July 22, 1908.

To Henry B. Robb, Esq., Cl'k C. C. U. S., E. D. Pa.

(Endorsed: 69. April Sessions, 1904. C. C. U. S. E. D. Penna. International Coal Mining Co. vs. Pennsylvania R. R. Co. Præcipe for entry of judgment on verdict. Newlin. Filed July 24, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

- 652 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Assignments of Error.

And now, July 24, 1908, comes The Pennsylvania Railroad Company, defendant in above suit, and, by its attorneys, Sellers & Rhoads and Francis I. Gowen, Esqs., files the following assignments of error upon which it will rely upon its appeal from the judgment of the Court entered in said cause:

I. The learned Court erred, subject to exception for defendant, in ruling as follows:

"Counsel for defendant offers in evidence an exemplification of the record of Court of Common Pleas No. 1, in the case of the Cresson and Clearfield Coal and Coke Company vs. The International Coal Mining Company, of June Term, 1901, No. 3588, the same exemplification having been filed of record in this case, for the purpose of showing the sale of the franchises and assets of every character and description, including choses in action and claims in action, of the plaintiff company, under the order of the Court of Common Pleas No. 1, which sale was made by the Sheriff of Philadelphia County on September 29th, 1905, and subsequently confirmed by Court of Common Pleas No. 1.

(Objected to.)

The COURT: The objection is sustained for the reason
653 that this Court has decided that this chose in action did not
pass by the sale.

(Exception noted for defendant.)"

(Notes of testimony, pages 315 and 316.)

II. The learned Court erred in charging in the manner quoted
in the following exception allowed to defendant:

Counsel for the defendant excepted, inter alia, as follows:

"Mr. GOWEN: Your Honor will allow us an exception to the re-
fusal of our points, and also to that portion of your charge in which
you said that when the defendant establishes rates from one district,
that it is to be conclusively presumed against it, that all the services
rendered by it in transporting from that district are like and similar.
I presume your Honor intended that instruction to cover the ship-
ments made over the Huntingdon and Broad Top Railroad, although
you did not specifically deal with that feature of the case."

"The COURT: I understood there were not any Huntingdon and
Broad Top shipments claimed here."

(Charge of the Court, page 16.)

The part included within the said exception is the following:

"Under the Interstate Commerce Act transportation companies are
required to publish their rates from certain points to certain points,
and it has been the practice of the transportation companies through-
out the country to designate certain districts as the initial point, and
the Interstate Commerce Commission has permitted that to be done,
because it would be impossible for a transportation company to
schedule every small station or by-way from which it transports its
commerce. If Philadelphia is the initial point, it may be that Cam-
den, Norristown, Doylestown, West Chester, and other neighboring
places may be taken in a particular district as part of the ini-

654 tial point. I do not say that is the case, but railroad com-
panies are permitted to take in a scope of country as an initial
point, and the Interstate Commerce Commission has said that is a
compliance with the law, and when a railroad company does take
in a district as an initial point from which to ship its goods and
schedules that in its tariff rates as an initial point or district from
which it is transporting merchandise, it is conclusive evidence against
the railroad company that as to all merchandise and property of like
kind from that particular district the service is, as to the initial
point, a like service under substantially similar circumstances and
conditions. That is to say, so far as the starting point is concerned,
the services are rendered under similar circumstances and condi-
tions. All the Clearfield district, as designated in these tariff sched-
ules, is on the same footing. Any man shipping coal out of the
Clearfield district, if he ships to the same destination under similar
circumstances, it makes no difference where he loads his coal in the
Clearfield district, is receiving only a like service under substantially
similar circumstances and conditions." (Charge of the Court, pages
5 and 6.)

III. The learned Court erred in charging in the manner quoted
in the following exception allowed to defendant:

Counsel for defendant excepted, inter alia, as follows:

"Mr. GOWEN: I desire to take an exception to the submission to the jury of the question whether there is any evidence that this point was in the Clearfield region." (Charge of the Court, page 17.)

The part included within the said exception is the following:

"The Court: Gentlemen of the jury, it is contended by the defendant that all the shipments made by the plaintiff during
655 this time, starting from the Huntingdon and Broad Top Railroad, were not in the Clearfield district, and that the evidence does not show that they were in the Clearfield district, and for that reason they were not a like service rendered under substantially similar conditions and circumstances. The plaintiff contends that the shipments on the Huntingdon and Broad Top Railroad and the point of shipment from which the plaintiff shipped its coal on that road, are in the Clearfield district, and that the evidence in this case shows that they were treated as being in the Clearfield district. You will say which is correct. You will say whether the evidence shows it is in the district or is not in the district. If it is in the district, the shipments from that point would be from the same initial point. If it is not in the district they would not be from the same initial point. It is a matter for you." (Charge of the Court, pages 16 and 17.)

IV. The learned court erred, subject to exception for defendant, in refusing the second point presented by defendant, as follows:

"2. There is no evidence that shipments of other shippers made after April 1st, 1899, were carried by the defendant to destinations to which the plaintiff was shipping at lower freight rates than it charged the plaintiff on its shipments to such destination, except certain shipments made by the other shippers embracing coal which had been sold by such other shippers prior to April 1st, 1899, under contract deliveries under which were required to be made after April 1st, 1899."

(Refused. Exception noted for defendant.)"

(Charge of the Court, pages 24 and 25.)

V. The learned Court erred, subject to exception for defendant, in refusing the fourth point presented by defendant, as follows:

"4. If the jury believe that it would tend to the benefit of
656 its shippers and would also tend to secure for it a larger volume of business, the carrier is not guilty of discrimination forbidden by the Interstate Commerce Act, because it carries at rates of freight in force at the time such contracts were entered into, coal embraced in and shipped under contracts extending for a period of time, even though at the same time it may be charging a higher rate on coal not covered by or embraced in contracts of such character, provided it extends the benefit of the lower rates to all shippers having such contracts, and shipping coal thereunder."

(Refused. Exception noted for defendant.)"

(Charge of the Court, page 25.)

VI. The learned Court erred, subject to exception for defendant, in refusing the seventh point presented by defendant, as follows:

"7. The plaintiff is not entitled to recover on its shipments made

in any one month or period of time because of the fact that during such time the defendant transported at a lower rate than it charged the plaintiff a portion of the shipments of some other shipper. If such lower rate was not justified the amount which the plaintiff is entitled to recover is measured by the difference between the rate per ton which it paid on all its shipments during such period and the rate per ton which the other shipper paid on his or its whole volume of shipments during such period.

As there is no evidence from which the jury can estimate the rate per ton paid on all their shipments by the shippers, a portion of whose shipments were carried at lower rates than were charged the plaintiff, there is no basis upon which to estimate the amount which the plaintiff is entitled to recover, and it is only, therefore entitled to recover nominal damages."

(Refused. Exception noted for defendant.)"

(Charge of the Court, pages 26 and 27.)

657 VII. The learned Court erred, subject to exception for defendant, in refusing the eighth point presented by defendant, as follows:

"8. The evidence establishes the fact that the plaintiff itself did not pay the freights a portion of which it now claims a right to recover. Payment of these freights, as the evidence shows, was made by those who purchased the coal from the plaintiff on which the freights were paid.

In order to entitle the plaintiff to recover it must have established to your satisfaction that under the terms of sale of this coal it, and not the purchasers, would have recovered the benefit of any reduction in the rate. The only evidence as to the terms of sale is that given by Mr. Wilson. The credibility of his testimony is for you to consider. If you are not satisfied to accept it as true, the plaintiff cannot recover. In considering the credit which you should give to Mr. Wilson's testimony on this point, it is due to the defendant that you should take into account the fact, if it be a fact, that the testimony of Mr. Wilson on other points or the statements embodied in the record of this case which he has sworn to, have been shown to have been either false or inaccurate, and that you should further consider whether any circumstance has been established which fairly excuses the non-production by the plaintiff of its books showing the character of the transactions between itself and the purchasers of the coal."

(Refused. Exception noted for defendant.)"

(Charge of the Court, pages 27 and 28.)

VIII. The learned Court erred, subject to exception for defendant, in refusing the ninth point presented by defendant, as follows:

"9. As it appears from the evidence that the plaintiff since April, 1899, or shortly thereafter became conversant with the fact that the defendant was carrying at lower rates coal shipped under what
658 has been referred to in the case as unfilled or overlapping contracts, the subsequent payment by it of the rates charged by the defendant on the coal carried for its account, if, in point of fact, such payments were made by it or on its account, without protest of any sort against the right of the defendant to charge and collect the

rate which it was thus required to pay, debars it from maintaining any action to recover any part of the freight thus paid."

(Refused. Exception noted for defendant.)"

(Charge of the Court, page 28.)

IX. The learned Court erred, subject to exception for defendant, in refusing the tenth point presented by defendant, as follows:

"10. To entitle the plaintiff to recover anything in excess of nominal damages as to its shipments made after April 1st, 1899, the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was carrying at the same time at lower rates coal shipped by other shippers. The plaintiff has not shown that it did sustain any such loss or injury, and it is entitled, therefore, to recover only nominal damages, even if the carriage at such lower rates for other shippers by the defendant was not justified."

Refused. Exception noted for defendant.)"

(Charge of the Court, pages 28 and 29.)

X. The learned Court erred, subject to exception for defendant, in refusing the eleventh point presented by defendant, as follows:

"11. Under all the evidence in the case the plaintiff is only entitled to recover nominal damages, and your verdict should accordingly be only for such an amount."

(Refused. Exception noted for defendant.)"

(Charge of the Court, page 29.)

659 XI. The learned Court erred, subject to exception for defendant, in refusing the twelfth point presented by defendant, as follows:

"12. Under all the evidence in the case the plaintiff is not entitled to recover, and your verdict must be for the defendant."

(Refused. Exception noted for defendant.)"

(Charge of the Court, page 29.)

XII. The learned Court erred, subject to exception for defendant, in sustaining objection to the following question asked defendant's coal agent:

"Q. Were the adjustments which were made with any shipper on account of unfilled contracts made on his or its total tonnage?"

(Objected to as irrelevant. Also because the railroad company has the whole evidence on the subject and can prove it in the regular and proper way.)

(Objection sustained. Exception noted for defendant.)"

(Notes of testimony, page 314.)

XIII. The learned Court erred in entering judgment against defendant for want of a rebutter.

XIV. The learned Court erred in overruling defendant's demurrer to the so-called second further replications to its special plea filed Jan. 21, 1907, instead of entering judgment for defendant thereon.

XV. The learned Court erred in entering judgment upon the verdict in favor of plaintiff.

SELLERS & RHOADS,
FRANCIS I. GOWEN,
Attorneys for Defendant.

(Endorsed: No. 69. Apr. Term, 1904. C. C. U. S. East. Dist. Pa. International Coal Mining Company vs. P. R. R. Co. Assignments of Error. Filed July 24, 1908. Henry B. Robb, Clerk; per B. Sellers & Rhoads, Francis I. Gowen, for Deft.)

660 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Petition for Writ of Error.

The Pennsylvania Railroad Company, defendant in above entitled cause, feeling itself aggrieved by the verdict of the jury and the final judgment entered thereon the twenty-fourth day of July, 1908, comes now, by Sellers & Rhoads and Francis I. Gowen, Esqs., its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Third Circuit, and that a transcript of the record of proceedings and papers upon which said final judgment was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Third Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error; and that upon the giving of such security, all further proceedings in this Court be suspended and stayed
661 until the determination of said writ of error by the said United States Circuit Court of Appeals for the Third Circuit.

SELLERS & RHOADS,
FRANCIS I. GOWEN,
Attorneys for Defendant.

Before Holland, J.

Prayer of Petition allowed by the Court.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

July 24, 1908.

(Endorsed: No. 69. Apr. Term, 1904. C. C. U. S. East. Dist. Pa. International Coal Mining Company vs. P. R. R. Co. Petition for Writ of Error and Order of Allowance. Filed July 24, 1908. Henry B. Robb, Clerk. Sellers & Rhoads, Francis I. Gowen, for Deft.)

662 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY.

Defendant's Bond Sur Writ of Error to the United States Circuit Court of Appeals for the Third Circuit.

Know all men by these presents, that we, The Pennsylvania Railroad Company, defendant in above suit, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the International Coal Mining Company, plaintiff in said suit, in the full and just sum of twenty-four thousand and twenty-seven dollars and two cents (\$24,027.02) lawful money of the United States of America, to be paid to the said plaintiff, its certain attorney, successors or assigns, to which payment well and truly to be made, we and each of us bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals this 24th day of July, in the year of our Lord one thousand nine hundred and eight (1908).

Whereas lately at a session of the Circuit Court of the United States for the Eastern District of Pennsylvania, in a suit depending in said Court, between the said International Coal Mining Company, plaintiff, and the Pennsylvania Railroad Company, defendant, a judgment was rendered against the said the Pennsylvania Railroad Company, and the said The Pennsylvania Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's
663 office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said International Coal Mining Company, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden in the City of Philadelphia within thirty days.

Now, the condition of the above obligation is such, that if the said The Pennsylvania Railroad Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good then the above obligation to be void, else to remain in full force and virtue.

THE PENNSYLVANIA RAILROAD COMPANY,

By J. B. THAYER, *Vice President.*

Attest:

[SEAL.] K. S. GREEN, *Assist. Secretary.*

AMERICAN SURETY COMPANY OF NEW YORK,

By R. R. BENNETT,

Resident Vice President.

Attest:

[SEAL.] M. E. NEVILLE, *Res't Ass't Sec'y.*

Before Holland, J.

Approved:

By the Court.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

July 24, 1908.

"Philadelphia Agency No. 17766."

(Endorsed: No. 69. Apr. Term, 1904. C. C. U. S. East Dist.
Pa. International Coal Mining Company vs. P. R. R. Co.
664 Defendant's Bond sur Writ of Error and Order of Approval.
Filed July 24, 1908. Henry B. Robb, Clerk; per B. Sellers & Rhoads, Francis I. Gowen, for Def't.)

In the Circuit Court of the United States for the Eastern District
of Pennsylvania, April Sessions, 1904.

No. 69.

INTERNATIONAL COAL MINING COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

To the Clerk of the Circuit Court of the United States for the Eastern District of Pennsylvania:

In making up the transcript of record in the above entitled cause you are to include the following papers:

Præcipe for Summons.

Summons.

Appearance.

Statement of Claim.

Rule to Plead.

Pleas.

Affidavit and Order of Court granting rule on defendant to show cause why certain papers, etc., should not be produced, etc., etc.

Affidavit and Order of Court granting an additional rule on defendant to show cause why they should not produce on the trial certain papers, etc.

Defendant's Answer to plaintiff's rule to show cause why certain papers and writings should not be produced at trial.

665 Rule to show cause why Replication should not be stricken off.

Order granting leave to withdraw Replication filed March 6, 1906.

Replication.

Demurrer to Replication of Plaintiff.

Answer of defendant to rule to produce books and papers.

Rule to strike off plea of October 25, 1905.

Petition of Trustee in bankruptcy to intervene.

Order granting continuance and staying proceedings until further order of Court.

Further Replication to special plea and rule on defendant to re-join in fifteen days or judgment.

Demurrer to further Replication to third plea.

Order for withdrawal without prejudice of rules to produce, etc., granted. February 19th and February 28th, 1906.

Second further Replication to special plea.

Rule on defendant to re-join in fifteen days or judgment.

Affidavit of J. Chester Wilson and order granting rule on defendant for production of papers, etc., on trial returnable February 13, 1907.

Demurrer to second further Replication.

Answer to rule to produce papers at trial, etc.

Opinion, Holland, J., overruling demurrer to Replication.

Rejoinder of the Pennsylvania Railroad Company to plaintiff's Replication.

Order granting leave to file Rejoinder of The Pennsylvania Railroad Company to plaintiff's Replication.

Motion to strike off rejoinder of defendant filed March 11, 1907.

Opinion, Holland, J., requiring defendant to produce books and papers at the trial of the case.

Affidavit and order granting rule on plaintiff to show cause why it should not file a Bill of Particulars.

666 Petition of Trustee for modification of order of March 25th, 1907, on rule to produce, etc., and Order of Court granting rule to show cause, etc., returnable March 29, 1907, at 10 o'clock A. M.

Plaintiff's answer to rule of March 27, 1907, for Bill of Particulars.

Opinion, Holland, J., making absolute rule to show cause why defendant should not produce at the trial certain documentary evidence.

Opinion, Holland, J., directing plaintiff to produce certain books and papers.

Exemplification of Record from the Court of Common Pleas No. 1, in the case of Cresson and Clearfield Coal and Coke Co., vs. International Coal Mining Company.

Petition of Edward D. McLaughlin, Trustee in Bankruptcy of the International Coal Mining Company under Act of July 20, 1892, and Order of Court refusing prayer of petition.

Plaintiff's Additional Petition for rule on defendant to produce documentary evidence, &c.

Order granting rule on defendant to produce documentary evidence.

Plaintiff's sur rejoinder to defendant's rejoinder to plaintiff's replications filed by leave of Court.

Rule on defendant to file rebutter.

Plaintiff's motion to make absolute rule to produce, returnable April 13, 1908.

Defendant's Answer to rule to produce.

Affidavit of service of copy of plaintiff's sur rejoinder and rule on defendant to file rebutter.

Præcipe for judgment against defendant on plaintiff's sur rejoinder for want of a rebutter.

Petition for rule on defendant to show cause why it should not have leave to amend statement.

Order of Court granting rule on defendant to show cause why plaintiff should not have leave to amend statement, returnable

April 24, 1908, at 10 o'clock A. M.

667 Demurrer of defendant to plaintiff's sur rejoinder.

Petition for rule to show cause why judgment entered for failure of defendant to file rebutter should not be opened.

Answer of defendant to rule to show cause why plaintiff should not have leave to amend its statement of claim.

Answer of plaintiff to petition of defendant to open defendant's judgment for want of rebutter.

Petition to set aside service of subpoena.

Depositions of James W. M. Newlin and William Querns on behalf of plaintiff sur petition of the defendant for rule to show cause why judgment entered for failure of defendant to file a rebutter should not be opened.

Motion on behalf of defendant for privilege to examine books while in custody of clerk and order of Court thereon.

Motion on behalf of plaintiff requesting the clerk to mark letter books, etc., and order of Court thereon.

Petition for further order to produce on Order of April 2nd, 1907, and order of Court granting rule to show cause, etc., returnable Thursday, May 14, 1908.

Answer sur petition of plaintiff this day filed for order to produce books and papers, also to have included in accountant's report statement of plaintiff's shipments via Greenwich Pier to points beyond the Delaware Capes.

Exceptions to granting of rule to show cause of May 13, 1908.

Exceptions of plaintiff to answer of defendant to rule of May 13, 1908.

Order dismissing exceptions of plaintiff to defendant's Answer, to rule to show cause of May 13, 1908, and to rule of May 13.

Motion and reasons for new trial.

Motion for extension of time for filing motion and reasons for new trial and Order of Court thereon.

668 Motion and Reasons for new trial on behalf of defendant.

Exception to sealing of defendant's Bill of Exceptions.

Opinion, Holland, J., refusing plaintiff's and defendant's motions for new trial.

Præcipe for judgment for plaintiff.

Bill of Exceptions.

Assignments of Error.

Petition for Writ of Error.

Order allowing Petition for Writ of Error.

Bond sur Writ of Error.

Order approving Bond sur Writ of Error.

Writ of Error.
Citation.
And no others.

SELLERS & RHOADS,
FRANCIS I. GOWEN,
Attorneys for Defendant.

(Endorsed: No. 69. Apr. Sess. 1904. U. S. C. C. E. D. of Pa. International Coal Mining Co., vs. Penna. R. R. Co. Præcipe for transcript of record sur writ of error. Filed July 28, 1908. Henry B. Robb, Clerk.)

669 UNITED STATES,
Eastern District of Pennsylvania, set:

I, Henry B. Robb, Clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of International Coal Mining Company vs. Pennsylvania Railroad Company, No. 69, April Session, 1904, as per præcipe filed, a copy of which is hereto attached, on file and now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Philadelphia, this 14th day of August, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-third.

[SEAL.]

HENRY B. ROBB,
Clerk of C. C.

670 And afterwards to-wit on the eighth day of December,

A. D., 1908, this cause being called for argument on the transcript of record from the Circuit Court of the United States for the Eastern District of Pennsylvania, before Hon. George M. Dallas, Hon. George Gray and Hon. Joseph Buffington, Circuit Judges, and being argued by counsel for the respective parties and the court not being fully advised in the premises takes further time for consideration thereof.

And afterwards to wit on the sixth day of October, A. D., 1909, comes the parties aforesaid by their counsel aforesaid and the court now being fully advised in the premises renders the following opinion, to-wit:

In the United States Circuit Court of Appeals for the Third Circuit,
October Term, 1908.

No. 36.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
vs.
INTERNATIONAL COAL MINING COMPANY, Defendant in Error,
and

INTERNATIONAL COAL MINING COMPANY, Plaintiff in Error,
vs.
PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

671 In Error to the Circuit Court of the United States for the
Eastern District of Pennsylvania.

Before Dallas, Gray and Buffington, Circuit Judges.

BUFFINGTON, *Circuit Judge*:

In the court below, the International Coal Mining Company, herein called the Mining Company, recovered a verdict against the Pennsylvania Railroad Company, herein called the Railroad, for alleged discrimination in freight charges. To a judgment entered on such verdict both parties sued out writs of error. We will first consider that of the Railroad.

It seems the Mining Company shipped coal over the Railroad's lines from its mines in bituminous regions of Pennsylvania to tide water from 1894 to 1901. The court excluded evidence bearing on the shipments prior to July 29, 1896, on the ground they were barred by the statute of limitations. As to the shipments from that date to April 1899, the evidence showed the Mining Company paid the same rate as other shippers. Consequently, there was no recovery for that period. From April 1, 1899, to 1901, it was conceded the Mining Company paid a higher rate than other shippers and the verdict covered shipments during such period.

The suit is vased on Sec. 2 of the Act of February 4, 1887, which provides: "If any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from
672 any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." The Railroad sought to

escape liability for such excess freight charges during said last named period by reason of the following facts. On April 1, 1899, by its published tariff, it advanced its coal freight rates. At that time, many shippers from the Mining Company's vicinity to seaboard had outstanding contracts to make coal deliveries over a series of years. These contracts were based on the freight rates in force when they were made. The Railroad feeling its new and higher rates would entail serious loss on shippers bound by such contracts, herein called contract coal, continued in the case of such contracts, the old and lower freight rates. This was done openly, and indeed the Mining Company was informed if it had such contracts its coal would be carried at the old rate. It had no such contracts and therefore it was charged the higher rate for what was called free coal and the verdict is based on such differential. The Mining Company's shipments were in part from the Huntingdon & Broad Top Railroad, which

673 by it. The shipments of contract coal were made from the Huntingdon & Broad Top Railroad. The other shipments of the Mining Company, as well as shipments of contract coal by other shippers, were made from the Clearfield District. The court submitted to the jury the question whether the Huntingdon & Broad Top Railroad was part of the Clearfield District, and its verdict established that such was the case. Now the Railroad sought to draw a distinction between shippers of "contract coal" and "free coal" as above described, requesting the court to charge: "If the jury believes that it would tend to the benefit of its shippers and would also tend to secure for it a larger volume of business, the carrier is not guilty of discrimination forbidden by the Interstate Commerce Act, because it carries at rates of freight in force at the time such contracts were entered into, coal embraced in and shipped under contract extending for a period of time, even though at the same time it may be charging a higher rate on coal not covered by or embraced in contracts of such a character, provided it extended the benefits of the lower rates to all shippers having such contracts, and shipping coal thereunder." We are thus brought face to face with the question whether the existence of these contracts created a dissimilarity of circumstance and condition under which the service of carriage was rendered. To us the reading of the act is clear. The act contemplates, "compensation for any service rendered." Now it is manifest that "service rendered," is the physical service of carriage. Elsewhere it is spoken

674 of as "a like and contemporaneous service;" such service is "service in the transportation;" it is a service in the transportation of a like kind of traffic;" and it is a service in transportation "under substantial similar circumstances and conditions." The law having in view the carriage of freight and equal rates to all, it is clear to us that the words, "substantially similar circumstances and conditions," as used in this subsection, are those which affect transportation and not those which involve personal conditions of contractual relations between one particular shipper and the carrier, but are such things only as are circumstances of carriage generally. In *Wight vs. United States*, 167 U. S. 513, it was sought

to differentiate the service performed by the different terminal facilities of the two shippers at their respective warehouses, but the court held these were not the circumstances and conditions of the Act, but that the circumstances and conditions the act contemplated were those which affect the actual carriage of the freight, using the language: "It was the purpose of this act to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay." And that phrase, "circumstances of carriage," was carefully chosen one limiting the circumstances to such as affected haulage of freight, is shown in *Interstate Com. Com. vs. Alabama*, 160 U. S., 166, where, referring to *Wight vs. United States*, supra, the court say: "We there held that the phrase "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage, and does not include competition between rival routes." It follows, therefore, that if these circumstances and conditions of section two are those which affect haulage, and do not include competition between rival routes, that they do not include individual elements affecting individual shippers. The purpose of the section is to afford identity of rate for substantial identity of transportation service and anything that does not aid in determining what is such substantial identity of haulage does not aid in the application of the action. Evidently it was with this view the court purposely said in that part of its charge here assigned for error: "It is contended by the defendant that if shippers have overlapping contracts they can be classified. The Interstate Commerce Act authorizes the classification of commerce. You can ship coal for one price per ton, iron pipe for another and pig iron for another. In other words, there is a classification of commerce. Whether they could classify overlapping contracts, schedule them and make them public or not, is not a question in this case, but it is a question whether or not, when they schedule a certain figure for the transportation of property from one point to another, as their tariff rate, and make that public, they are bound by it, and the law is that they cannot have a private agreement, overlapping or not overlapping, which gives a competitor, during the contemporaneous shipments, a return or an advantage over the published rate." Where as in this case the Railroad made a published rate for coal from the Clearfield District to tide water and the Railroad charged the Mining Company for this haulage the published rate, but charged other shippers for the same haulage lower rates it is clear it violated the second section in that, as said by the Supreme Court, "two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor." Whether indeed, the railroad might — classified contract coal in one class and free coal in another is not before us for in point of fact it made no such classification and made no differential rates for such coal. What it did was to give a rate on coal from the Clearfield District to seaboard to one shipper and deny it to another and thereby it violated the express provisions of the statute. The

like circumstances and conditions are those which arise within the field of haulage and not those which exist outside. In this case the Railroad charged to one shipper a rate of haulage and the coal of the other shipper being hauled from the same initial locality to the same terminal point, the haulage was identical and therefore the freight should be the same. To hold otherwise and to say that because one shipper had made a prior contract on lower freight rates, the service was thereby made dissimilar is not only to contend for a physical non sequitur, but it introduces a practice fraught with possibilities of unjust discrimination and fraudulent rebates.

The next question concerns the shipments of the Mining Company from the Huntingdon & Broad Top Railroad Company. Just what the relation of that road is to the Pennsylvania Railroad, we

are not exactly shown either in the proofs or briefs. The 677 proofs do show, however, that the Huntingdon & Broad Top

Railroad was within what for freight purposes was known as the Clearfield District, that the rate from it was obtained from the Pennsylvania Railroad and was the general Clearfield District rate and that the Mining Company had no dealings or rate quotations from the Huntingdon & Broad Top Railroad. The portion of the charge which reads: "It is contended by the defendant that all the shipments made by the plaintiff during this time, starting from the Huntingdon & Broad Top Railroad, were not in the Clearfield District, and for that reason they were not a like service rendered under substantially similar conditions and circumstances. The plaintiff contends that the shipments on the Huntingdon & Broad Top Railroad and the point of shipment from which the plaintiff shipped its coal on that road, are in the Clearfield District, and that the evidence in that case shows that they were treated as being in the Clearfield District. You will say which is correct. You will say whether the evidence shows it is in the district or is not in the district. If it is in the district, the shipments from that point would be from the same initial point. If it is not in the district they would not be from the same initial point. It is a matter for you"—is here assigned for error. We find no error in such language. Whatever

may have been its relations with the Broad Top Railroad, the Pennsylvania for freight purposes chose to include it within the Clearfield District, published rates from it as within such district, quoted such rate to the Mining Company and collected the same. By such

678 acts the jury had a right to infer the Broad Top Railroad was, so far as the purposes of this case went, and for freight purposes, a part of the Pennsylvania Railroad system. Thus one of the witnesses, speaking of the Broad Top as a separate organization, operated by its own officers, says: "we didn't know it in freight rates; we didn't ask them for freight rates; we never obtained any freight rates from them. There was no difference in getting a freight rate on Broad Top shipments from Sonman or Clearfield County shipment." He further said: "Q. Taking up the matter of the Huntingdon & Broad Top; they were in the Clearfield region? A. Yes; under the tariff rates. Q. And your dealings as to freight were entirely with the Pennsylvania Railroad, that is to say, the Pennsyl-

vania fixed a rate which covered the movement on the Huntingdon & Broad Top? A. Yes. Q. So that was one transaction without regard to the starting point and that was in the Clearfield region— one transaction from start to finish, delivery point, with the Pennsylvania Railroad? A. Yes.” Under these proofs we think the court was right in submitting the question to the jury whether shipments over the Pennsylvania Railroad originating on the Huntingdon & Broad Top were shipments from the Clearfield District and embraced within the rate established for that district by the Pennsylvania Railroad for by the first section of the act the term “railroad” is defined to mean “all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease”.

That being established, the shipments of the Mining Company
679 were entitled to the same rates for like shipments the railroad gave any other like shipper in the Clearfield District, although the shipments of the latter did not originate in that particular part of the Clearfield District covered by the Huntingdon & Broad Top. As a matter of policy it may well be that it would be to the advantage of railways to make such an arrangement, but Congress has not left those matters open to them. It has laid down the broad simple principle of like rate for like service and has not authorized the railroad to make other extrinsic considerations a ground for giving different rates for the same service. For, as was said in *London & Northwestern Ry. Co. vs. Evershed* 3 Appeal Cases, Law Reports, 1038; “If equality of charges is to be disregarded under any circumstances that might be made a cloak for making inequalities of charge under unjustifiable circumstances. I do not know whether that was the motive and intention of the Legislature or not, and I do not inquire. What the legislature has clearly said is that the tolls must be charged equally to all persons under the same circumstances. I think that means under similar circumstances as to the goods, not as to the person. I do not think the person comes into the question at all.”

The next assignment of error raises the question of the propriety of the court's refusal of defendant's second point, which is: “The plaintiff is not entitled to recover on all its shipments made in any
680 one month or period of time because of the fact that during such time the defendant transported at a lower rate than it charged the plaintiff a portion of the shipments of some other shipper. If such lower rate was not justified the amount which the plaintiff is entitled to recover is measured by the difference between the rate per ton which it paid on all its shipments during such period and the rate per ton which the other shipper paid on his or its volume of shipments during such period. As there is no evidence from which the jury can estimate the rate per ton paid on all their shipments by the shippers, a portion of whose shipments *were* carried at lower rates than were charged the plaintiff, there is no basis on which to estimate the amount which the plaintiff is entitled to recover, and it is only, therefore, entitled to recover nominal damages.” This point in effect requested the court to charge, as fixing the measure of recovery, not the lowest rate charged by the railroad to another shipper,

but the general average paid on all shipments made by such shipper. For instance, the railroad contends that where another shipper's contract coal was charged a less rate than the Mining Company, the recovery was not fixed by the difference between these two rates, but the fixing rate was the average rate paid on all contract coal shipped at the lowest rate and all free coal at the higher rate. We think the court was right in denying this point. Whatever may be argued in support of the equity of such a rule the simple answer is that Congress made no such rule. The purpose of the Act is clear, viz.: to enforce equality of rate for like service in every case and the mischief is done when for that service a shipper is charged more than
any other shipper is charged for "any service rendered, or
581 to be rendered, in the transportation of passengers or property". So long as it charges a lower rate for any shipment the law is defeated, although on other shipments it may charge the proper rate.

The next assignment of error raises the question whether the plaintiff can maintain this action in view of the fact that with knowledge that it was being charged a higher rate for its free coal than other shippers were charged for contract coal, it nevertheless paid the freight without protest. It is now claimed that the absence of protest accompanying payment of freight is fatal to the right of action. We are of opinion such is not the case. This is not the ordinary case of a suit to recover back a sum of money which has been mistakenly paid and received, but is one where a statute has stamped the receipt of the money as unlawful. Thus Sec. 2 provides: "Such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful", and creates a statutory right of recovery, not of the freight paid, but of damages, viz.: "Such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act." From this it is clear that Congress *having* conferred a statutory right of action and *having* imposed a liability to action by Sec. 8 on the carrier, who shall "do, or cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful". And we may add, having conferred such right of action without imposing
the precedent condition of protest, it follows that the courts
682 cannot by construction impose on its statutory rights a condition which Congress has not imposed. It follows, therefore, that this assignment cannot be sustained. This is in harmony with the holding of the Supreme Court in *United States Bank vs. Bank of Washington*, 6 Pet. 17, where it was said: "Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and the law, at the very time of payment, creates the obligation to refund it. A notice of intention to recover back the money, does not, even in such cases, create the right to recover it back; that results from the illegal exaction of it; and the notice may serve to rebut the inference that it was a voluntary payment, or made through mistake".

The next question raised is that the court erred in refusing to

admit in evidence an exemplification of a record of the State Court in the case of the Cresson & Clearfield Coal & Coke Company vs. The International Coal Mining Co., for the purpose of showing a judicial sale of the International Coal Mining Company's claim or chose in action which is the subject matter of the present suit. We see no reversible error in such ruling by the court. Whatever might be the effect of such judicial sale, the refusal of the court to admit it as a matter of evidence at the trial was not improper. When this suit was brought the right of action was clearly in the International Coal Mining Company, then and now the legal plaintiff. It is alleged such right of action was, after action was brought, sold from it by judicial sale. But waiving the question whether this sale
683 which was made on a lien obtained within four months prior to bankruptcy is not void under the law, it is clear the sale would not abate the action; Thatcher vs. Rockwell, 105 U. S., 467; Eyster vs. Graff, 91 U. S., 521. No contention is now made that the right of action did not pass to the trustee, if it was not previously divested by the alleged judicial sale. When a plaintiff in a pending action becomes bankrupt, such action is not thereby abated; Hahlo vs. Conn. 15 American Bankruptcy Reports, 591, for Section 11 of the Act provides: "A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him." Accordingly, the trustee in this bankruptcy was here made use plaintiff and the action proceeded. Now it seems at some prior stage the defendant sought to abate the action by virtue of this judicial sale, but the court had not sustained such effort. However that may be, we have in the assignment of error now before us the simple offer of the exemplification in evidence. In that form the question was simply a contest of the plaintiff's and the defendant had no legal right to interject that question into the trial. If admitted, so far as anything disclosed in the offer on which the assignment is based is concerned, it could not have affected the defendant—consequently its rejection constitutes no reversible error.

It remains to consider the assignments of error raised by the Mining Company on the writ it has taken to review this
684 judgment. Theoretically it may have a right to have these questions reviewed, but that it has no practical administrative end in view is apparent from the fact that on the other branch of the case it is strenuously insisting on the affirmance of the same judgment it here academically, but not really, asks to have reversed. With this in view it suffices, without an extended discussion, to say we have examined the assignments involved and find no error. For example, it is here sought to convict the court below of error in overruling challenges of the plaintiff to certain jurors. In view of the fact that the jury awarded the plaintiff the full amount of its claim on the evidence before it and that the plaintiff is insisting on sustaining the judgment on such verdict, it is clear the court's ruling did the plaintiff no harm and the assignment is void of merit. It is further contended that there was error in the court's refusing to

enter judgment for default of defendant in not producing papers in obedience to order. The court below was satisfied with the production made and we finding nothing in the record to satisfy us that the court did not understand its own order or was mistaken in holding it was complied with. Another assignment involves the right of the plaintiff to recover damages on shipments of coal made before April 1, 1889. In that respect the court ruled that while there was evidence the railroad had carried coal for others prior to that date for less than its published rates the plaintiff itself had received the benefit of such lower rates in common with other shippers and there was no discrimination against it. We think the

685 court properly disposed *posed* of this aspect of the case in its charge when it said: "Up until July 1st, if all the evidence is to be believed, the plaintiff, its competitors and the defendant, were all engaged in violating the law, the railroad in giving rebates unlawfully; the plaintiff in soliciting and accepting the same rebates that its competitors solicited and accepted; and under those circumstances courts do not sit to measure the difference in degree of violation of the law in favor of one party or the other. The question of the money value that each of them received in their violation of the law, will not be looked into nor taken up, nor investigated by courts of justice. Courts of justice are not instituted to measure difference in money value to two people who are engaged in violation of the same law, and therefore the court will not permit them to recover, not for the purpose of relieving the defendant, but because the plaintiff is just as culpable, and under this law, if any criminality attaches has been just as much a violator of the law as the defendant. That is the reason I say they cannot recover up to that time."

The next question raised involved the court's restricting plaintiff's right to recover to a sum measured by the difference between the rates charged it and other shippers and *celining* to consider alleged advantages enjoyed by the Berwind-White Company in reference to a lease of Harrison's pier, allowance for handling coal there, and on the Altoona Coal & Coke Company, a short connecting line. It suffices to say no such ground of action was declared on and the court was justified in the exclusion of such features from the

686 jury. Indeed, after due consideration of these and other assignments, which we do not deem it necessary to discuss in detail, we find no error by the court below and its judgment is therefore affirmed, each party to pay costs on its own writ of error.

687 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1908.

No. 36.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error.

vs.

INTERNATIONAL COAL MINING COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

GEO. GRAY,
Circuit Judge.

Philadelphia, October 7, 1909.

688 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between The Pennsylvania Railroad Company, plaintiff in error, and International Coal Mining Company, defendant in error a manifest error hath happened, to the great damage of the said plaintiff in error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 5th day of November, in the year of our Lord one thousand nine hundred and nine.

[Seal of the Supreme Court of the United States.]

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

689 UNITED STATES OF AMERICA, ss:

To International Coal Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Third Circuit wherein The Pennsylvania Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, this fifth day of November, in the year of our Lord one thousand nine hundred and nine.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

689½ COUNTY OF PHILADELPHIA,
State of Pennsylvania, ss:

On this ninth day of November, in the year of our Lord one thousand nine hundred and nine personally appeared before me, the subscriber, John Kelly, and makes oath that he resides at 2324 Wallace Street, Philadelphia, Pennsylvania, and that he delivered true copies of this within citation to the following persons this date:

1. Henry W. Lambirth, President of the International Coal Mining Company, at Room 413 Betz Building, Philadelphia aforesaid.
2. James W. M. Newlin, counsel of record of the International Coal Mining Company in the present suit of said Company against the Pennsylvania Railroad Company, instituted in the Circuit Court of the United States for the Eastern District of Pennsylvania, of April Term, 1904, No. 69.
3. John Stockburger, Trustee in Bankruptcy of the International Coal Mining Company, a Bankrupt and Defendant in Error in present suit, said service having been made at 308 Walnut Street, Philadelphia aforesaid.

JOHN KELLY.

Sworn to and subscribed before me this ninth day of November, 1909.

[SEAL.]

HENRY B. ROBB,
Clerk U. S. C. C., E. D. of Pa.

690 Know all men by these presents, That we, Pennsylvania Railroad Company, a corporation under the laws of Pennsylvania as principal, and American Surety Company of New York, a corporation as surety are held and firmly bound unto International Coal Mining Company, a corporation in the full and just sum of twenty-five thousand (25,000) dollars, to be paid to the said International Coal Mining Company its certain attorney, successor or assigns: to which payment, well and truly to be made, we bind ourselves, and our successors jointly and severally, by these presents. Sealed with our seals and dated this fifth day of November, in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a term of the United States Circuit Court of Appeals for the Third Circuit in a suit depending in said Court between Pennsylvania Railroad Company as Plaintiff in Error and International Coal Mining Company as defendant in error a judgment was rendered against the said Pennsylvania Railroad Company and in favor of said International Coal Mining Company and the said Pennsylvania Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said International Coal Mining Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now the condition of the above obligation is such, That if
691 the said Pennsylvania Railroad Company shall prosecute its said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

PENNSYLVANIA RAILROAD COMPANY,
By FREDERIC S. McKENNEY, [SEAL.]

Its Attorney.

J. B. THAYER,

Vice President.

[SEAL.]

Attest:

K. S. GREEN,
[SEAL.] *Ass't Secretary.*

AMERICAN SURETY COMPANY OF NEW YORK,
By H. E. HEXALL, (?) [SEAL.]

Resident Vice President.

Attest:

W. A. LAURINS, (?)
[SEAL.] *Resident Assistant Secretary.*

Sealed and delivered in presence of
L. H. BERNER.

Approved by
JOHN M. HARLAN,
*Associate Justice of the Supreme Court of the
United States.*

692 *Order Approving Trustee's Bond.*

In the District Court of the United States for the Eastern District
of Pennsylvania.

No. 2398. In Bankruptcy.

In the Matter of INTERNATIONAL COAL MINING COMPANY, Bankrupt.

At a Court of Bankruptcy, Held in and for the Eastern District of
Pennsylvania, at Philadelphia, this 28th Day of October, 1909.

Before Richard S. Hunter, Referee in Bankruptcy.

It Appearing to the Court that John Stockberger, of Philadelphia, and in said District, has been duly appointed Trustee of the estate of the above-named Bankrupt, and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed by the creditors and by order of the court, to wit, in the sum of One hundred (\$100) Dollars, it is ordered that the said bond be, and the same is hereby, approved.

RICHARD S. HUNTER,
Referee in Bankruptcy.

693 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify, that the annexed and foregoing is a true and faithful copy of the original Order approving Trustee's Bond, received from the Referee and entered and filed on the twenty-eighth day of October A. D. 1909, in the matter of International Coal Mining Company, Bankrupt, in Bankruptcy, Cause No. 2398, and now remaining among the records of the said Court.

Witness my hand and the seal of the said Court, this ninth day of November, A. D. 1909.

[SEAL.]

WM. W. CRAIG,
Clerk District Court U. S.

(Indorsed:) Cause No. 2398. United States District Court, Eastern District of Pennsylvania. In Bankruptcy. In the Matter of International Coal Mining Company, Bankrupt. Certified copy of Order approving Trustee's Bond.

694 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, et c:

I, Henry B. Robb, Clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original certified copy of order approving Trustee's Bond in Bankruptcy filed November 9th, 1909, in the case of International Coal Mining Company vs. Pennsylvania Railroad Company, No. 69, April Sess., 1904, on file and now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Philadelphia, this ninth day of November in the year of our Lord one thousand nine hundred and nine and of the Independence of the United States the one hundred and thirty-fourth.

HENRY B. ROBB,
Clerk of C. C.
 LEO LILLY, *Deputy.*

(Indorsed:.) No. 69, April Sessions, 1909, Circuit Court United States, Eastern District of Pennsylvania. International Coal Mining Company vs. Pennsylvania Railroad Company. Certified copy of Order approving trustee's Bond in Bankruptcy. Filed November 9, 1909.

695 In the Circuit Court of Appeals for the Third Circuit, October Term, 1908.

No. 36.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,
 vs.
 INTERNATIONAL COAL MINING COMPANY, Defendant in Error.

Assignments of Error.

And now, December 1st, 1909, comes The Pennsylvania Railroad Company, plaintiff in error, and, by its counsel, Sellers & Rhoads, and Francis I. Gowen, Esqs., files the following assignments of error.

1. The Circuit Court erred in declining to instruct the Jury, as requested by the Plaintiff in Error in the Fourth point presented by it, which point was as follows:

"If the jury believe that it would tend to the benefit of its shippers and would also tend to secure for it a larger volume of business, the carrier is not guilty of discrimination forbidden by the Interstate Commerce Act, because it carries at rates of freight in force at the time such contracts were entered into, coal embraced in and shipped under contracts extending for a period of time, even though at the same time it may be charging a higher rate on coal not covered

by or embraced in contracts of such character, provided it extends the benefit of the lower rates to all shippers having such contracts, and shipping coal thereunder."

696 2. The Circuit Court erred in declining to instruct the Jury, as requested by the Plaintiff in Error in the seventh point presented by it, which point was as follows:

"The plaintiff is not entitled to recover on its shipments made in any one month or period of time because of the fact that during such time the defendant transported at a lower rate than it charged the plaintiff a portion of the shipments of some other shipper. If such lower rate was not justified the amount which the plaintiff is entitled to recover is measured by the difference between the rate per ton which it paid on all its shipments during such period and the rate per ton which the other shipper paid on his or its whole volume of shipments during such period.

"As there is no evidence from which the jury can estimate the rate per ton paid on all their shipments by the shippers, a portion of whose shipments were carried at lower rates than were charged the plaintiff, there is no basis upon which to estimate the amount which the plaintiff is entitled to recover, and it is only, therefore, entitled to recover nominal damages."

3. The Circuit Court erred in instructing the Jury that if they found that the points on the line of the Huntingdon & Broad Top Railroad and Coal Company from which a portion of the plaintiff's shipments had been made were in the same district or region in which the shipments originated which it was claimed had been carried by the defendant at lower and consequently discriminatory rates of freight, and that the defendant had in force at the time of such shipments the same tariff rate from all points in this region to the various destinations to which the shipments were made, the establishment and maintenance of this uniform rate was conclusive evidence against the defendant that a like service was performed by it in respect to the transportation of the plaintiff's and of the other shipments, the instruction to this effect being as follows:

697 "When a railroad company does take in a district as an initial point from which to ship its goods and schedules that in its tariff rates as an initial point or district from which it is transporting merchandise, it is conclusive evidence against the railroad company that as to all merchandise and property of like kind from that particular district the service is, as to the initial point, a like service under substantially similar circumstances and conditions. That is to say, so far as the starting point is concerned, the services are rendered under similar circumstances and conditions. All the Clearfield district as designated in these tariff schedules, is on the same footing. Any man shipping coal out of the Clearfield district, if he ships to the same destination under similar circumstances, it makes no difference where he loads his coal in the Clearfield district, is receiving only a like service under substantially similar circumstances and conditions."

4. The Circuit Court erred in refusing to instruct the Jury, as

requested by the plaintiff in error in the fifth point presented by it, which point was as follows:

"The burden is upon the plaintiff to prove that the service rendered by the defendant in the transportation of the coal for other shippers on which it charged a lower rate was a like service to that which it rendered the plaintiff. As to the plaintiff's shipments which originated on the line of the Huntingdon and Broad Top Railroad the service performed by the defendant in transporting these shipments was not a like service to that which it performed in transporting shipments originating on its own lines, and hence the plaintiff cannot recover as to any of its shipments which originated on the Huntingdon and Broad Top Railroad."

5. The Circuit Court erred in declining to instruct the Jury as requested by the plaintiff in error in the eighth point presented by it, which point was as follows:

698 "The evidence establishes the fact that the plaintiff itself did not pay the freights a portion of which it now claims a right to recover. Payment of these freights, as the evidence shows, was made by those who purchased the coal from the plaintiff on which the freights were paid.

"In order to entitle the plaintiff to recover it must have established to your satisfaction that under the terms of sale of this coal it, and not the purchasers, would have received the benefit of any reduction in the rate. The only evidence as to the terms of sale is that given by Mr. Wilson. If you are not satisfied to accept it as true, the plaintiff cannot recover. In considering the credit which you should give to Mr. Wilson's testimony on this point, it is due to the defendant that you should take into account the fact, if it be a fact, that the testimony of Mr. Wilson on other points or the statements embodied in the record of this case, which he has sworn to, have been shown to have been either false or inaccurate, and that you should further consider whether any circumstance has been established which fairly excuses the non-production by the plaintiff of its books showing the character of the transactions between itself and the purchasers of the coal." The Court's answer to this point being as follows:

"I do not think that there is anything at issue in this case that depends on the testimony of Mr. Wilson. If I did I would call attention to the fact that Mr. Wilson has sworn to conditions at different times differently. The fact that this coal was shipped by the plaintiff is established. The schedule of the railroad company is not disputed. Mr. Wilson testified, of course, that consignees paid the freight and returned the balance to him. It makes no difference who would get the advantage, the plaintiff is the proper party to sue. There is no doubt the freight was paid, and there is no dispute here that there was any different amount collected than the schedule rate. It was collected from somebody, and it was either collected from the consignee or the plaintiff, and whichever it was collected from, the plaintiff is the proper party to sue. Mr. Wilson's testimony does not seem to me to be of importance, to the finding of any material fact in this case."

6. The Circuit Court erred in declining to instruct the jury as re-

quested by the plaintiff in error in the ninth point presented by it, which point was as follows:

699 "As it appears from the evidence that the plaintiff since April, 1899, or shortly thereafter, became conversant with the fact that the defendant was carrying at lower rates coal shipped under what has been referred to in the case as unfilled or overlapping contracts, the subsequent payment by it of the rates charged by the defendant on the coal carried for its account, if, in point of fact, such payments were made by it or on its account, without protest of any sort against the right of the defendant to charge and collect the rate which it was thus required to pay, debars it from maintaining any action to recover any part of the freight thus paid."

7. The Circuit Court erred in declining to instruct the jury as requested by the plaintiff in error in the tenth point presented by it, which point was as follows:

"To entitle the plaintiff to recover anything in excess of nominal damages as to its shipments made after April 1st, 1899, the jury must be satisfied that it sustained some loss or injury, due to the fact that the defendant was carrying at the same time at lower rates coal shipped by other shippers. The plaintiff has not shown that it did sustain any such loss or injury, and it is entitled, therefore, to recover only nominal damages, even if the carriage at such lower rates for other shippers by the defendant was not justified."

8. The Circuit Court erred in declining to instruct the jury as requested by the plaintiff in error in the eleventh point presented by it, which point was as follows:

"Under all the evidence in the case the plaintiff is only entitled to recover nominal damages, and your verdict should accordingly be only for such an amount."

700 9. The Circuit Court erred in declining to instruct the jury as requested by the plaintiff in error in the twelfth point presented by it, which point was as follows:

"Under all the evidence in the case the plaintiff is not entitled to recover, and your verdict must be for the defendant."

10. The Circuit Court erred in sustaining the objection of the Defendant in error to the following question put by counsel for the Plaintiff in error to J. G. Searles, the General Coal Freight Agent of the Plaintiff in error.

"Q. Were the adjustments which were made with any shipper on account of unfilled contracts made on his or its total tonnage?"

"Objected to as irrelevant. Also because the Railroad Company has the whole evidence on the subject and can prove it in the regular and proper way."

11. The Circuit Court erred in sustaining the objection made by the Defendant in error to the admission in evidence of an exemplification of the record of the Court of Common Pleas No. 1 for the County of Philadelphia, in the case of the Cresson and Clearfield Coal & Coke Company vs. International Coal Mining Company, the latter being the plaintiff in the present action, which exemplification was offered in evidence for the purpose of showing that pursuant to an order made by the said Court of Common Pleas No. 1 of the

County of Philadelphia in the case referred to a sale had been had of the franchises and assets of every character and description, including choses in action and claims in action of the plaintiff company, and that this sale had been subsequently confirmed by the said Court, the purpose of this offer being to show that whatever claim or right of action, if any, the plaintiff prior to such sale was in a position to assert against the defendant, had been lost through this sale and had passed to and vested in the purchaser thereat.

701 12. The Circuit Court erred in declining to enter judgment for the Plaintiff in error upon its demurrer to the Defendant in Error's replication to the special plea filed October 25, 1905, the Plaintiff in error having by said plea pleaded the sale of the Defendant in error's franchises, and its assets of every description, including claims and choses in action, made by the Court of Common Pleas No. 1 for the County of Philadelphia in a proceeding of which the said Court had jurisdiction, and to which the said Defendant in error, the International Coal Mining Company, was a party, having been the defendant therein, to which plea the Defendant in error had replied that the proceeding had in the said Court of Common Pleas No. 1 was void and ineffective because the said Court of Common Pleas No. 1 had no authority to sell its claim and choses in action, because the sale had been procured through some alleged fraudulent practices to which it was claimed the Plaintiff in error had been a party, and, lastly, because the sale had been avoided by an adjudication of bankruptcy made and entered against the international Coal Mining Company within four months after the date of the sale.

13. The Circuit Court of Appeals erred in affirming the judgment entered by the Circuit Court in favor of the plaintiff.

14. The Circuit Court of Appeals erred in not reversing the judgment of the Circuit Court.

SELLERS & RHOADS,
FRANCIS I. GOWEN,
For Plaintiff in Error.

702 [Endorsed:] No. 36. October T., 1908. Circuit Court of Appeals for the Third Circuit. The Pennsylvania Railroad Company, Plaintiff in Error, vs. International Coal Mining Company, Defendant in Error. Assignments of Error. Filed December 2, 1909. Wm. H. Merrick, Clerk. Sellers & Rhoads, Francis I. Gowen, for Plaintiffs in Error.

703 UNITED STATES OF AMERICA,
*Eastern District of Pennsylvania,
Third Judicial District, et:*

I, William H. Merrick, Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in the case of Pennsylvania Railroad Company Plaintiff in Error, vs. International Coal Mining Company, Defend-

ant in Error, No. 36 October Term, 1908, on f^e and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this third day of December, in the year of our Lord one thousand nine hundred and nine and of the Independence of the United States the one hundred and thirty-fourth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. H. MERRICK,

Clerk U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No. 21,923. U. S. Circuit Court Appeals, 3d Circuit. Term No. 168. Pennsylvania Railroad Company, plaintiff in error, vs. International Coal Mining Company. Filed December 4th, 1909. File No. 21,923.



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IN THE
Supreme Court of the United States

Office Supreme Court
SEP 30 1912
JAMES H. McK

PENNSYLVANIA RAILROAD COMPANY

Plaintiff in Error

VS.

INTERNATIONAL COAL MINING COMPANY

Defendant in Error

In Error to the United States Circuit Court of
Appeals for the Third Circuit

Brief on Behalf of the Plaintiff in
Error

FREDERIC D. MCKENNEY
FRANCIS I. GOWEN

For Plaintiff in Error



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IN THE
SUPREME COURT OF THE UNITED STATES

No. 14. October Term, 1912

PENNSYLVANIA RAILROAD COMPANY
Plaintiff in Error
vs.

INTERNATIONAL COAL MINING COMPANY
Defendant in Error

In Error to the United States Circuit Court of Appeals
for the Third Circuit

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR

STATEMENT OF THE CASE

The International Coal Mining Company, the defendant in error, which had been a shipper of bituminous coal over the lines of the Pennsylvania Railroad Company, the plaintiff in error, between April 1, 1894, and April 1, 1901, instituted the present action to recover damages claimed to have been sustained because of alleged violations by the Railroad Company of the provisions of the Interstate Commerce Act, the Mining Company's claim being (a) that it had been charged unreasonable rates for the carriage of its shipments, and (b) that it had been subjected to unlawful discrimination because it had been charged higher rates than

had certain other shippers, in respect to whose shipments, it was asserted, the Railroad Company had rendered a like service under similar circumstances and conditions.

Upon the trial the defendant in error offered no evidence to substantiate its claim that the rates charged for the transportation of its coal had been excessive and consequently unreasonable; the testimony had relation solely to the other branch of the case.

As stated, the shipments embraced in the action had been made between April 1, 1894, and April 1, 1901. Recovery was had only as to those made after April 1, 1899. As to those made prior to April 1, 1898, the Circuit Court held that any claim in respect thereto was either barred by the Statute of Limitations or by the circumstance that on all of the shipments made prior to that date the defendant in error had received the benefit of concessions from the tariff rates in force at the time, a fact which in the judgment of the Court disqualified it from maintaining any action based upon the allegation that the concessions which it had received were not as great as those secured by some other shippers.

And as to those made between April 1, 1898, and April 1, 1899, the evidence affirmatively established the fact that the rates charged thereon had been as low as those charged any other shippers for a like service.

As to the shipments made after April 1, 1899, as to which a recovery was had, the evidence established that the tariff rates had been charged to and paid by all shippers, but that subsequently a portion of the charges collected from some shippers had been refunded under the following circumstances:

It was the practice of the plaintiff in error on April 1st of each year to put in force rates on bituminous coal which, except in the case of some unexpected contingency, would continue in force for one year. This was under-

stood by shippers, who, as a rule, so adjusted their business that deliveries under any contracts which they might enter into covering deliveries for any fixed period of time would be completed within the so-called "coal year," in which they were entered into. This was not, however, the invariable practice, and this was notably so as to contracts for the furnishing of coal to steamships or steamship companies, which were generally known as "bunker" contracts. As to these it appeared from the testimony of the Secretary of the defendant in error, that contracts were frequently not confined to the coal year in which they happened to be made, but often called for deliveries extending over longer periods. (See Transcript of Record, page 312.) No question as to the rate of freights to be applied on shipments made under such contracts when these extended over April 1st in any year had arisen prior to April 1, 1899, because of the fact that there had been no advances of rates which would make it necessary to give consideration to this question. On April 1, 1899, however, a general advance in its coal rates was made by the plaintiff in error, and at the time of this advance some shippers over its lines were under contract with steamship and railroad, and, in a few instances, manufacturing companies, which called for deliveries through the new coal year and in some instances through the year 1900, and the price at which the coal had been sold, which was a delivered price at the point of destination of the shipments, had been based upon the rates of freight in force at the time the contracts were entered into. The plaintiff in error was in no sense a party to these contracts, and so far as the evidence goes did not know of their existence until about the time when the advance in rates was to take effect, but as it was manifest that if the higher rates were applied to shipments made in fulfillment of these contracts loss would be entailed upon the shippers who were

parties to them, the plaintiff in error determined to, and did, continue to apply the rates prevailing prior to April 1, 1899, to all shipments of coal made on and subsequent thereto under these unfilled and unexpired contracts.

On April 1, 1900, some additional advances in rates were made, but on shipments made thereafter under contracts entered into prior to April 1, 1899, the plaintiff in error continued to charge the freight rates in force at the time the contracts were entered into.

The separate rates thus charged on contract and non-contract coal were not shown in the plaintiff in error's tariffs. These showed but the one rate,—the one charged to and paid by the defendant in error and, in the first instance, by all shippers.

The plaintiff in error advised its shippers of the determination reached in respect to the contract coal, and although the defendant in error in its Statement of Claim alleged that it had no knowledge until a short time prior to the institution of the action of the lower rates charged on the coal shipped under these unexpired contracts, this allegation was shown upon the trial to have been untrue, for the Secretary of the defendant in error admitted that on or about April 1, 1899, he had been notified by the General Coal Freight Agent of the plaintiff in error of what was proposed to be done, and had been asked whether his Company had outstanding any contracts under which deliveries had still to be made, and had also been expressly informed that it was the intention of the plaintiff in error, if there were such contracts, to apply the lower rates on shipments made thereunder. (See Transcript of Record, pages 312 and 356.) And it was further shown that on May 10, 1900, the defendant in error filed with the plaintiff in error copies of contracts made in the year preceding April 1, 1900, with the view of securing the lower rates

prevailing in that year on shipments made thereunder after April 1, 1900. (See Transcript of Record, page 313.)

Shipments of coal in fulfillment of obligations under contracts entered into by other shippers were made during the coal years commencing April 1, 1899, and April 1, 1900, and while the plaintiff in error charged and collected the tariff rates on all these shipments, a refund was subsequently made to the shippers of a sum which represented the difference between the tariff rates in force at the time the shipments were made and those in force at the time the contracts were entered into. These refunds were made in the following manner: At the end of each month in which any coal had been carried by the plaintiff in error for any shipper which represented in part shipments under unfilled contracts the shipper rendered statements of the amount of the tonnage of this character so transported, and upon the verification of the statements the plaintiff in error paid to the shipper a sum which represented the difference between the amount paid by him on such proportion of his tonnage and the amount which would have been payable thereon had the tariff rates been applied to it which had been in force prior to April 1, 1899.

The defendant in error did not undertake to establish what proportion of any shipper's coal had been included in these monthly adjustments or refunds. It did appear, however, that as to one—and the largest one—of the shippers of contract coal, viz., the Berwind White Coal Mining Company, less than one-tenth of its shipments represented coal of this character. On this point Mr. E. J. Berwind, the President of that Company, a witness called by the defendant in error, testified as follows:

“Q. While I do not suppose you can give us the actual tonnage shipped under these overlapping contracts and the tonnage which was not embraced within them in any year, can you give us about what propor-

tion of your tonnage was covered by the overlapping contracts?

"A. Less than 10%. I think considerably less.

"Q. On the balance of your shipments you paid the tariff rate?

"A. We did.

"Q. Without any repayment?

"A. Either direct or indirect."

(Transcript of Record, page 340.)

The plaintiff in error in its case undertook to go into this feature, but was stopped by an objection, which was sustained by the Court. (See Transcript of Record, page 358.)

The larger portion of the defendant in error's shipments as to which a recovery was had did not originate on the line of the plaintiff in error, but on that of another Company, viz., the Huntingdon & Broad Top Railroad Company. This railroad was a separate and distinct organization from that of the plaintiff in error, and its operations were conducted by its own officers. Its road connected with that of the plaintiff in error, and the two companies had in effect joint through rates.

The shippers of the contract coal were all located on the line of the plaintiff in error, but the tariff rates of freight applicable to their shipments and to those made from points on the Huntingdon & Broad Top Railroad Company were the same to the same destinations, and the defendant in error contended—and this contention was sustained by the finding of the jury—that the mines of the shippers of the contract coal and the mines on the Huntingdon & Broad Top Railroad Company from which the defendant in error's shipments were made were all in one District, known and referred to by those in the coal trade as the "Clearfield" District.

The rulings of the trial judge were as follows:

1. That the lower rates or charges made for the carriage of the contract coal were not justified because these had not been shown on the plaintiff in error's tariffs. He declined to pass upon the question whether the circumstances and conditions under which this coal was carried were different from those pertaining to the carriage of the non-contract coal.

2. That the defendant in error could recover only in respect to shipments in the carriage of which the plaintiff in error rendered a like service to that rendered by it in the carriage of the contract coal, but that in determining what was a like service, it was to be conclusively presumed that as to all shipments which originated in the Clearfield Region and were transported to the same destinations, the service was a like service regardless of the fact that as to the shipments of the defendant in error which originated on the Huntingdon & Broad Top Railroad the service performed in the transportation of these was a joint service of that Company and of the plaintiff in error, while in respect to the contract coal the service was a single service of the plaintiff in error.

3. That the lower charges on the contract coal, apart from any consideration of their effect on the defendant in error, were legally injurious to it, and that it was immaterial what proportion of the shipments made by shippers of contract coal was coal of such a character, as the defendant in error was entitled to recover as to all shipments even although only a small proportion of such other shipper's shipments had been carried at the lower rates.

In addition to the issues involved in the case to which reference has already been made, the right of the defendant in error to maintain the action was put at issue by a special plea filed and also by an offer of evidence made upon the

trial. The plea set forth that subsequent to the institution of the action a judicial sale under a judgment against the defendant in error obtained in a State Court of Pennsylvania—Common Pleas of Philadelphia County—had been made of all of its property and assets, including claims, choses in action and causes in action, whether arising out of contracts, torts, or penalties, and that as a consequence the cause of action sought to be asserted by the defendant in error in the present action had passed from it to the purchaser at such sale.

To this plea several replications were filed. In none of these were the facts set up by the plea controverted, but various matters were alleged which were relied upon as sufficient to invalidate or make null and void the sale which had been thus made.

The matters thus relied upon were these:

First.—That the sale was invalid because brought about by what the pleader designated as a combination and conspiracy entered into between the plaintiff in the action in which the sale had been had and the plaintiff in error in the present action, the alleged purpose and object of this combination and conspiracy being the destruction of the defendant in error's claim against the plaintiff in error.

Second.—That the sale was invalid because certain taxes due the Commonwealth of Pennsylvania by the defendant in error had not been paid, the claim being that until these had been paid no effective sale could have been had.

Third.—That the sale was invalidated because of the fact that within a period of four months thereafter a proceeding in bankruptcy against the defendant in error had been instituted, which had eventuated in an adjudication of bankruptcy.

Fourth.—That the sale was invalid because the Act of Pennsylvania under which the proceedings were had did not justify a sale of choses and claims in action.

The plea to which reference has been made will be found at page 23, and the various replications at pages 119, 126 and 129 of the Transcript of Record.

Demurrers to all these replications were filed which the Circuit Court overruled because of the conclusion reached by it that the sale of the defendant in error's choses and claims in action was null and void because not warranted by any Statute of the State of Pennsylvania. The opinion of the Court overruling the demurrers will be found at page 137 of the Transcript of Record.

The learned Judge in reaching this conclusion did not controvert the fact that a sale had actually been made by the Court of Common Pleas of Philadelphia County of the claims and choses in action of the defendant in error, as averred in the plea, but his conclusion was rested upon the proposition that no authority existed for the making of such a sale.

Upon the trial of the case an exemplification of the Record of the Court of Common Pleas in the case which had eventuated in the sale referred to in the plea was offered in evidence, but was excluded by the learned trial Judge upon the ground that he had already determined that this sale was ineffective to affect the defendant in error's right to the claim embraced in the action.

The Circuit Court of Appeals affirmed the rulings of the trial Court, and disposed of the main issues raised on behalf of the plaintiff in error in the following manner:

It held, although apparently reserving the question whether the plaintiff in error might have classified its coal shipments in such a way as to differentiate in rates as between the contract and non-contract coal, that under the case as disclosed by the testimony the plaintiff in error was not justified in applying the lower rate on the contract coal.

It further held that the defendant in error was entitled to recover as to the shipments made from points on the Huntingdon & Broad Top Railroad because of the conclusion reached by it that there was evidence from which the jury might have found that that railroad was a part of the plaintiff in error's railroad for all purposes connected with the present case, because the Secretary of the defendant in error had testified that his dealings as to freight on shipments of his company were entirely with the plaintiff in error, this being sufficient, in the opinion of the Court, to make the railroad of the Huntingdon & Broad Top Company a part of the railroad of the plaintiff in error because of the provision contained in the Interstate Commerce Act that the term "railroad" as used therein should include "all the road in use by any corporation operating a railroad whether owned or operated under a contract, agreement or lease."

It also held that the lower rates on contract coal were of themselves legally injurious to the defendant in error, and that its right to recover as to all its shipments was not affected by the fact that only a portion of the contract shippers' coal had been transported at lower rates. In disposing of the contention to the contrary urged by the plaintiff in error, the Court said:

"Whatever may be argued in support of the equity of such a rule, the simple answer is that Congress made no such rule. The purpose of the Act is clear, viz, to enforce equality of rate for a like service in every case, and the mischief is done when for that service a shipper is charged more than any other shipper is charged for any service rendered or to be rendered in the transportation of passengers or property. So long as it charges a lower rate for any shipment, the law is defeated, although on other shipments it may charge the proper rate."

(Transcript of Record, page 425.)

As to the judicial sale made by the Court of Common Pleas of Philadelphia County, the conclusion reached by the Circuit Court of Appeals was rested not upon the ground that the sale as made was invalid or void for any reason, but upon the ground that even if it had operated to pass to the purchaser the claim embraced in the action, this would not constitute a defence to the action, the Court's view apparently being that inasmuch as the sale did not operate to relieve the plaintiff in error from liability to someone, it was immaterial whether this someone was the defendant in error or the purchaser at the sale.

"The question," said the Court, "was simply a contest of the plaintiff's, and the defendant had no legal right to interject that question into the trial."

(Transcript of Record, page 426.)

In dealing with this question of the effect of the sale the Court for some reason not apparent in the opinion dealt with the question only as affected by the refusal of the Court below to admit in evidence the exemplification of the record which disclosed the sale thus made. The Court did not consider the plea, but in view of the ground upon which its decision was rested there would seem to be no doubt that the conclusion reached would not have been affected by the averments contained therein.

SPECIFICATIONS OF ERROR

The errors relied upon by the plaintiff in error, and which it desires to urge are those which are referred to in the following assignments of error filed on its behalf:

2. The Circuit Court erred in declining to instruct the jury, as requested by the plaintiff in error in the seventh point presented by it, which point was as follows:

"The plaintiff is not entitled to recover on its shipments made in any one month or period of time because

of the fact that during such time the defendant transported at a lower rate than it charged the plaintiff a portion of the shipments of some other shipper. If such lower rate was not justified the amount which the plaintiff is entitled to recover is measured by the difference between the rate per ton which it paid on all its shipments during such period and the rate per ton which the other shipper paid on his or its whole volume of shipments during such period.

"As there is no evidence from which the jury can estimate the rate per ton paid on all their shipments by the shippers, a portion of whose shipments were carried at lower rates than were charged the plaintiff, there is no basis upon which to estimate the amount which the plaintiff is entitled to recover, and it is only, therefore, entitled to recover nominal damages."

3. The Circuit Court erred in instructing the jury that if they found that the points on the line of the Huntingdon & Broad Top Railroad and Coal Company from which a portion of the plaintiff's shipments had been made were in the same district or region in which the shipments originated which it was claimed had been carried by the defendant at lower and consequently discriminatory rates of freight, and that the defendant had in force at the time of such shipments the same tariff rate from all points in this region to the various destinations to which the shipments were made, the establishment and maintenance of this uniform rate was conclusive evidence against the defendant that a like service was performed by it in respect to the transportation of the plaintiff's and of the other shipments, the instruction to this effect being as follows:

"When a railroad company does take in a district as an initial point from which to ship its goods and schedules that in its tariff rates as an initial point or district from which it is transporting merchandise, it is conclusive evidence against the railroad company that as to all merchandise and property of like kind from that particular district the service is, as to the

initial point, a like service under substantially similar circumstances and conditions. That is to say, so far as the starting point is concerned, the services are rendered under similar circumstances and conditions. All the Clearfield district as designated in these tariff schedules, is on the same footing. Any man shipping coal out of the Clearfield district, if he ships to the same destination under similar circumstances, it makes no difference where he loads his coal in the Clearfield district, is receiving only a like service under substantially similar circumstances and conditions."

4. The Circuit Court erred in refusing to instruct the jury, as requested by the plaintiff in error in the fifth point presented by it, which point was as follows:

"The burden is upon the plaintiff to prove that the service rendered by the defendant in the transportation of the coal for other shippers on which it charged a lower rate was a like service to that which it rendered the plaintiff. As to the plaintiff's shipments which originated on the line of the Huntingdon and Broad Top Railroad the service performed by the defendant in transporting these shipments was not a like service to that which it performed in transporting shipments originating on its own lines, and hence the plaintiff cannot recover as to any of its shipments which originated on the Huntingdon and Broad Top Railroad."

5. The Circuit Court erred in declining to instruct the jury as requested by the plaintiff in error in the eighth point presented by it, which point was as follows:

"The evidence establishes the fact that the plaintiff itself did not pay the freights a portion of which it now claims a right to recover. Payment of these freights, as the evidence shows, was made by those who purchased the coal from the plaintiff on which the freights were paid.

"In order to entitle the plaintiff to recover it must have established to your satisfaction that under the terms of sale of this coal it, and not the purchasers,

would have received the benefit of any reduction in the rate. The only evidence as to the terms of sale is that given by Mr. Wilson. If you are not satisfied to accept it as true, the plaintiff cannot recover. In considering the credit which you should give to Mr. Wilson's testimony on this point, it is due to the defendant that you should take into account the fact, if it be a fact, that the testimony of Mr. Wilson on other points or the statements embodied in the record of this case, which he has sworn to, have been shown to have been either false or inaccurate, and that you should further consider whether any circumstance has been established which fairly excuses the non-production by the plaintiff of its books showing the character of the transactions between itself and the purchasers of the coal."

the Court's answer to this point being as follows:

"I do not think that there is anything at issue in this case that depends on the testimony of Mr. Wilson. If I did I would call attention to the fact that Mr. Wilson has sworn to conditions at different times differently. The fact that this coal was shipped by the plaintiff is established. The schedule of the railroad company is not disputed. Mr. Wilson testified, of course, that consignees paid the freight and returned the balance to him. It makes no difference who would get the advantage, the plaintiff is the proper party to sue. There is no doubt the freight was paid, and there is no dispute here that there was any different amount collected than the schedule rate. It was collected from somebody, and it was either collected from the consignee or the plaintiff, and whichever it was collected from, the plaintiff is the proper party to sue. Mr. Wilson's testimony does not seem to me to be of importance, to the finding of any material fact in this case."

7. The Circuit Court erred in declining to instruct the jury as requested by the plaintiff in error in the tenth point presented by it, which point was as follows:

"To entitle the plaintiff to recover anything in excess of nominal damages as to its shipments made after April 1st, 1899, the jury must be satisfied that it sustained some loss or injury, due to the fact that the defendant was carrying at the same time at lower rates coal shipped by other shippers. The plaintiff has not shown that it did sustain any such loss or injury, and it is entitled, therefore, to recover only nominal damages, even if the carriage at such lower rates for other shippers by the defendant was not justified."

8. The Circuit Court erred in declining to instruct the jury as requested by the plaintiff in error in the eleventh point presented by it, which point was as follows:

"Under all the evidence in the case the plaintiff is only entitled to recover nominal damages, and your verdict should accordingly be only for such an amount."

9. The Circuit Court erred in declining to instruct the jury as requested by the plaintiff in error in the twelfth point presented by it, which point was as follows:

"Under all the evidence in the case the plaintiff is not entitled to recover, and your verdict must be for the defendant."

10. The Circuit Court erred in sustaining the objection of the defendant in error to the following question put by counsel for the plaintiff in error to J. G. Searles, the General Coal Freight Agent of the plaintiff in error.

"Q. Were the adjustments which were made with any shipper on account of unfilled contracts made on his or its total tonnage?"

"Objected to as irrelevant. Also because the Railroad Company has the whole evidence on the subject and can prove it in the regular and proper way."

11. The Circuit Court erred in sustaining the objection made by the defendant in error to the admission in evi-

dence of an exemplification of the record of the Court of Common Pleas No. 1 for the County of Philadelphia, in the case of the Cresson and Clearfield Coal & Coke Company vs. International Coal Mining Company, the latter being the plaintiff in the present action, which exemplification was offered in evidence for the purpose of showing that pursuant to an order made by the said Court of Common Pleas No. 1 of the County of Philadelphia, in the case referred to, a sale had been had of the franchise and assets of every character and description, including choses in action and claims in action of the plaintiff Company, and that this sale had been subsequently confirmed by the said Court, the purpose of this offer being to show that whatever claim or right of action, if any, the plaintiff prior to such sale was in a position to assert against the defendant, had been lost through this sale and had passed to and vested in the purchaser thereof.

12. The Circuit Court erred in declining to enter judgment for the plaintiff in error upon its demurrer to the defendant in error's replication to the special plea filed October 25, 1905, the plaintiff in error having by said plea pleaded the sale of the defendant in error's franchises, and its assets of every description, including claims and choses in action, made by the Court of Common Pleas No. 1 for the County of Philadelphia in a proceeding of which the said Court had jurisdiction, and to which the said defendant in error, the International Coal Mining Company, was a party, having been the defendant therein, to which plea the defendant in error had replied that the proceeding had in the said Court of Common Pleas No. 1 was void and ineffective because the said Court of Common Pleas No. 1 had no authority to sell its claims and choses in action, because the sale had been procured through some alleged fraudulent practices to which it was claimed the plaintiff in error had been a party, and lastly, because the sale had been avoided by an adjudication of bankruptcy made and

entered against the International Coal Mining Company within four months after the date of the sale.

13. The Circuit Court of Appeals erred in affirming the judgment entered by the Circuit Court in favor of the plaintiff.

14. The Circuit Court of Appeals erred in not reversing the judgment of the Circuit Court.

ARGUMENT

At the outset the question of the jurisdiction of the Circuit Court to entertain the action demands consideration, in view of the decisions of this Court in the cases of *Texas & Pacific Railway Company vs. Abilene Cotton Oil Company*, 204 U. S. 426, *Baltimore & Ohio Railroad Company vs. Pitcairn Coal Company*, 215 U. S. 481, and *Robinson vs. Baltimore & Ohio Railroad Company*, 222 U. S. 506. This question was not raised in the Courts below, but is necessarily in the case, for, as said by the present Chief Justice in the Pitcairn case, in dealing with the question of jurisdiction therein involved:

"The nature of the controversy and the relief which it requires is such that even without the assigned error to which we have referred the question at the very threshold necessarily arises and commands our attention as to whether there was power in the Courts under the circumstances disclosed by the record to grant the relief prayed consistently with the provisions of the Act to regulate Commerce."

In the light of the principles established in the Abilene and Pitcairn cases, and of the application made of these to the facts in the Robinson case, the conclusion would seem to be inevitable that the Circuit Court was not possessed of the requisite jurisdiction to consider and determine the underlying and basic issue in the present case.

The defendant in error was charged and paid the tariff rates applicable to its shipments, and in the present action it seeks to recover because of the exaction of these rates upon the theory that they were violative of the Interstate Commerce Act, because by their exaction, as claimed, the defendant in error was subjected to discrimination forbidden by that Act.

In order, therefore, to accord to the defendant in error the relief sought, it was incumbent upon the Circuit Court to find that the rates complained of were unduly discriminatory and consequently unlawful, and that the defendant in error had been injured because of their exaction. But unless we have wholly misapprehended the effect of the decisions of this Court above alluded to, this power was not possessed by the Circuit Court, but was exercisable primarily, at least, only by the Interstate Commerce Commission. This proposition seems to be so clearly established by the decision in the Robinson case above alluded to, as to render almost unnecessary further discussion of it.

In that case this Court held that a shipper who had paid the tariff rate applicable to his shipments could not maintain an action in the Courts to recover any portion thereof upon the ground that its exaction had subjected him to an unlawful discrimination forbidden by the Interstate Commerce Act, due to the fact that the carrier had in effect another and lower rate for a service which the plaintiff contended was in all respects "like", within the meaning of the Act, to that performed for him, unless and until the Interstate Commerce Commission had determined (a) that such higher rate was unduly discriminatory, and consequently unlawful, and (b) that its exaction entitled the plaintiff to reparation.

In reaching this conclusion, this Court, after referring to the provisions of the Interstate Commerce Act bearing upon the question at issue, speaking through Mr. Justice VAN DEVANTER, said:

"Thus, for the purpose of preventing unreasonable charges, unjust discriminations, and undue preferences, a system of establishing, maintaining and altering rate schedules and of redressing injuries resulting from their enforcement was adopted, whereby publicity would be given to the rates, their application would be obligatory and uniform while they remained in effect, *and the matter of their conformity to prescribed standards would be committed primarily to a single tribunal clothed with authority to investigate complaints and to order the correction of any non-conformity to those standards by an appropriate change in schedules and by due reparation to injured persons.*

"When the purpose of the Act and the means selected for the accomplishment of that purpose are understood, it is altogether plain that such an investigation and order by the designated tribunal, the Interstate Commerce Commission, should be a prerequisite to the right to seek reparation in the Courts because of exactions under an established schedule alleged to be violative of the prescribed standards."

And in disposing of the contention advanced upon behalf of the shipper in that case, that the necessary condemnation of the rate complained of had been secured from the Interstate Commerce Commission, this Court held that conceding this to have been the case, the action was still not maintainable because the Commission in its order condemning the rate had failed to award reparation to those injured by its exaction.

"The result," said Mr. Justice Van Devanter, referring to the action of the Commission upon which reliance was placed, "would have been the same had the decision been properly before the Court. An examination of it discloses that it did not contain any finding or direction as to what, if any, reparation should be made because of the prior exaction of the rate which it condemned."

The present case cannot, we submit, be distinguished from the Robinson case. The shipper in that case paid the

tariff rate applicable to his shipments, as did the shipper in the present case, and in each recovery was sought upon the ground that the rate charged was unduly discriminatory, and in each a finding or determination that it was such, and was consequently unlawful, was essential to the relief sought, and as it was held in the Robinson case that such a finding or determination was not one which a Court had power to make, it would seem necessarily to follow that the Circuit Court in the present case lacked the power to make a like finding.

And as in the Robinson case it was determined that even if there had been an order of the Commission condemning the rate, this would have been ineffectual in the absence of an order awarding reparation, it would seem necessarily to follow that in the present case, even if it were permissible to treat the rate paid as unduly discriminatory, the defendant in error must still fail because of the absence of the necessary order of the Commission awarding reparation.

The only distinction between the two cases is that in the Robinson case the discrimination complained of resulted from a lower tariff rate, while in the present case it resulted from a lower charge brought about or effected by refunds or concessions from the tariff rate. But this distinction imports no difference because after all the essential question is whether a Court is at liberty to treat as unlawful a tariff rate while and so long as this remains unaffected or uncondemned by any order of the Interstate Commerce Commission, and it would seem to be wholly immaterial, therefore, whether the case as presented involves an attack upon such rate as unlawful because of the existence of some other tariff rate, or because of the existence of a lower charge which was not embodied in any published or filed tariff.

Nor is the distinction referred to of any consequence with respect to the other necessary prerequisite, viz., a reparation order of the Commission, for in determining whether

a shipper has been injured by a lower rate than that paid by him, the fact that such lower rate was or was not the tariff rate is wholly unimportant. The actual charge made is the important consideration, and whether this was or was not embodied in a tariff is wholly unimportant.

The difficulty in the way of the present shipper is the same as that which was held to be insurmountable in the Robinson case, and that is that a Court is not the proper tribunal to set aside or annul the tariff rates of a carrier. This Court has settled that this power belongs exclusively to the Interstate Commerce Commission, and it would seem necessarily to follow that Courts cannot indirectly relieve shippers from the controlling effect of such rates by permitting recoveries either of any portion thereof or, what is equivalent thereto, of damages because of their exaction, until at least the shipper has been relieved from the binding force of such rates by action of the Commission. The decisions of this Court have, we submit, clearly established that a tariff rate is binding upon shipper as well as upon carrier. The obligation to observe the same is absolute and is, in effect, statutory in character.

The plaintiff in error in the present case, therefore, was bound to charge and collect, and the defendant in error was bound to pay the rates which were actually charged and paid. Both parties, then, being so bound, how can an action be maintained by one to recover from the other damages claimed to have been sustained because of the payment demanded and made, when this payment represented a charge which the one party was legally obliged to make and the other one legally obliged to pay? Is it not essential to a recovery in the present case that the defendant in error should have established that it had been required to pay a rate which the plaintiff in error ought not to have charged, and when it appears that the rate which was charged was the only one which could have been lawfully charged, does not necessarily the whole basis for the action disappear?

During the period in which the shipments were made as to which the defendant in error has recovered the Interstate Commerce Act contained the following provisions:

"Section 6. * * * And when any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of this Section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property or for any services in connection therewith than is specified in such published schedule of rates, fares and charges as may at the time be in force.

" * * * It shall be unlawful for any common carrier party to any joint tariff to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of persons or property or for any services in connection therewith between any points as to which a joint rate, fare or charge is named thereon than is specified in the schedule filed with the Commission in force at the time."

And by Section 10 violations of either of the above provisions were declared to be misdemeanors, and any carrier convicted thereof was made subject to a fine of not exceeding \$5000 for each offence.

If the present action is maintainable, it would seem necessarily to follow that the plaintiff in error should have been at liberty to pay to the defendant in error the amount properly demandable. And yet it will hardly be claimed that it could have made such a payment in view of the statutory obligation imposed upon it not merely to collect, but to retain, the tariff charges which it demanded and received from the defendant in error.

It will doubtless, however, be contended upon the part of the defendant in error that even if primary jurisdiction is vested in the Interstate Commerce Commission to consider and determine whether a given rate or system of rates

offends against the provisions of the Interstate Commerce Acts, and to grant relief therefrom, so long as the rate or system of rates are in existence, the Courts can exercise primary jurisdiction after the rates have ceased to exist and when the relief sought by a shipper has to do exclusively with the past, and when in order to afford this relief it is not necessary to find unlawful or to disregard any existing rate or system of rates.

Such a contention, however, would be wholly at variance, we submit, with the view of the Interstate Commerce Act which controlled the decisions of this Court in the Abilene and Robinson cases. The right of the Court to entertain the claim of the plaintiff in the Abilene case was denied mainly upon the ground that unless one tribunal was to consider and pass upon claims affecting the reasonableness of rates charged by a carrier, inequalities in charges would necessarily result, due to the conflicting views of the various tribunals that would be called upon to determine the questions at issue. How would it tend to relieve the situation of this difficulty and to bring about absolute equality of charge as between various shippers proceeding before various tribunals to recover because of alleged unlawful rates charged them that the tariffs covering the rates were no longer in force? This fact would not tend in the slightest degree to bring about uniformity.

But the possible contention with which we are dealing is really answered and disposed of by the following extracts from the opinion in the Abilene case:

"Although an established schedule of rates," said the present Chief Justice, "may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of, and awarding repara-

tion to, individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force." (Page 442.)

"When the Commission is called upon on the complaint of an individual to consider the reasonableness of an established rate its power is invoked not merely to authorize a departure from such rate in favor of the complaint alone, but to exert the authority conferred upon it by the Act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all. And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was in force by the carrier, and before its change and the establishment of a new one. In other words, the difference between the two is that which on the one hand would arise from destroying the uniformity of rates which it was the object of the Statute to secure, and, on the other, from enforcing that equality which the Statute commands." (Page 446.)

What was said in the Abilene case had, of course, reference to claims based upon the exaction of alleged unreasonable rates. The like considerations, however, would seem to apply to claims based upon the exaction of alleged discriminatory rates, and indeed this Court in the Robinson case has treated the decision and reasoning in the Abilene case as applicable to and controlling in cases in which the question involved had to do with discrimination in rates.

But wholly apart from what was said in the opinion of the Court in the Abilene case, the points at issue and which were determined in that and in the Robinson case would seem to leave no basis for the contention that Courts can afford relief to shippers who have paid unreasonable or unduly discriminatory charges if the relief sought has reference to past transactions solely and is wholly disassociated from any questions affecting the lawfulness of existing rates.

In both these cases the actions had been instituted by shippers to recover charges which they had paid and in neither was any attempt made to secure redress because of any existing rate. Indeed, it does not even appear from the report of the cases that the rates which formed the subject of the complaints were still in existence. But notwithstanding this it was held that the actions were not maintainable because the payments made were in conformity with rates which were as binding upon the Court as upon the shippers complaining of them.

If the contention with which we have just been dealing were a sound one, an easy way would be open to carriers to avoid condemnation of their rates by the Interstate Commerce Commission. All that would be necessary to be done would be in case of a threatened proceeding to cancel or in some way modify or change the rates in force and the Commission would be thereby rendered powerless.

We submit, therefore, that the Circuit Court had not jurisdiction to afford to the defendant in error the relief claimed because of the fact that the right thereto necessarily rests upon the proposition that the Court should itself pass upon and determine the question of the lawfulness of the plaintiff in error's tariff rates which were in force during the period of the action, a right or power which is not vested in the Courts but in the tribunal specially constituted for this purpose by the Interstate Commerce Acts, and because of the further fact that the question whether the defendant in error was entitled to reparation because of the payments which it had made was one primarily for the determination of the Interstate Commerce Commission.

And in this connection it should not be overlooked that it by no means follows that a condemnation by the Commission of the rate paid by the defendant in error would have necessarily resulted in an award of reparation in its favor. It would have been for the Commission to determine whether

the facts warranted or required such an order. In its administration of the Interstate Commerce Act the Commission in many instances has condemned as unlawful, because unreasonable or discriminatory, rates which have been exacted from shippers, while at the same time denying reparation to them. In two cases, which will be more fully referred to hereafter, the Commission thus denied reparation after condemning rates. These are *Anaconda Copper Mining Company vs. C. & E. R. R. Co., et al.*, 19 I. C. C. Rep. 592, and *International Salt Company vs. Pennsylvania Railroad Company, et al.*, 20 I. C. C. Rep. 539, and its decision in the former of these cases has been approved and affirmed by the Commerce Court.

But even if the considerations with which we have already dealt were not present in the case, and no difficulty in the way of a recovery by the defendant in error existed because the rate charged and paid by it was the tariff rate applicable to its shipments nor because it had secured no order from the Commission relieving it from the binding force and effect of this rate and awarding reparation to it, there would still be the difficulty that the Circuit Court was required, in order to afford the defendant in error any relief, to find that the charges made by the plaintiff in error for the carriage of the contract and non-contract coal were unlawful because discriminatory.

In the Pitcairn case the present Chief Justice said:

"A particular regulation of a carrier engaged in interstate commerce is assailed in the courts as unjustly preferential and discriminatory. Upon the facts found the complaint is declared to be well founded. The administrative powers of the commission are invoked concerning a regulation of like character upon a similar complaint. The Commission finds, from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference would result from the very pre-

valence of the two methods of procedure. If, on the contrary, the commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the commission was to prevail, then the function exercised by the court would not have been judicial in character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body."

What was thus said applies as well to discrimination in rates as to discrimination in practices, and it would seem, therefore, to be a necessary conclusion that if the Interstate Commerce Commission has been empowered to determine whether charges or rates of a carrier are unduly discriminatory or unduly preferential, a like power cannot be exercised by the Courts.

That such a power is possessed by the Interstate Commerce Commission will, of course, not be denied. Indeed, this Court in the case of *Interstate Commerce Commission vs. Delaware, Lackawanna & Western Railroad Company*, 220 U. S. 235, held that the Commission's power was of such an exclusive character that the Courts were bound by its conclusions as to whether or not a rate complained of was unduly discriminatory or preferential.

In the present case the Circuit Court held that it was not necessary to determine whether the different charges made by the plaintiff in error for the carriage of contract and non-contract coal violated the prohibitions of Section 2 of the Interstate Commerce Act, but sustained the right of the defendant in error to recover because of the higher charge made to it upon the ground that the lower rates on contract coal must be treated and regarded as unlawfully discriminatory because they were not shown on the tariffs of the plaintiff in error. But in so holding the Court, we submit, acted upon a view of the law which cannot be sus-

tained. If the plaintiff in error was justified in carrying contract coal at lower rates, the fact that it failed to show these rates on its tariff would not give the defendant in error any right to recover if no such right would have existed had the lower rate charged been a tariff rate. In other words, a shipper under the Interstate Commerce Act has no right to recover merely because a carrier charges some other shipper less than its tariff rate, unless, as a result of this, an inequality of charge forbidden by the second section of the Act is thereby brought about.

Nor does the fact that the lower than tariff rate results from the payment of a rebate of itself confer a right of action upon shippers to whom the rebates were not paid, unless as the result of the payment of these rebates an inequality of charge forbidden by the Act results.

Whether a lower rate complained of by a shipper was or was not a tariff rate is immaterial. The fact that it was a tariff rate will not protect the carrier if, in point of fact, the lower rate was not justified, and the fact that it was not a tariff rate will not give rise to a cause of action on behalf of the complaining shipper if, in point of fact, the lower rate was justified.

The Circuit Court of Appeals did not rest its decision upon the view of the law upon which the Circuit Court acted, but upon the ground that there were no circumstances and conditions affecting the carriage of the contract coal which justified a lower transportation charge than that made for the carriage of the non-contract coal, and that consequently the charges of the plaintiff in error were violative of Section 2 of the Act in that they were unduly discriminatory.

But whether or not the identity of circumstance and condition existed which required identity of charge is a question which, we submit, under the decisions of this Court was one that neither the Circuit Court of Appeals nor the

Circuit Court was competent to pass upon and determine because of the grant of exclusive jurisdiction over such questions made by the Interstate Commerce Act to the Interstate Commerce Commission.

Should the Court be with us on the jurisdictional question, consideration of the other issues involved in the case would of course be unnecessary. But if for reasons which we have failed to appreciate, the conclusion reached should be that the Circuit Court was justified in taking jurisdiction of the case and in determining the issues raised therein, consideration of these becomes necessary.

The issues raised by the contentions advanced upon behalf of the plaintiff in error which were determined adversely to it by the lower courts and which it is desired to submit for the consideration of this Court, were as follows:

1. DOES THE PAYMENT BY A CARRIER TO ONE SHIPPER OF AN UNLAWFUL REBATE GIVE TO ANOTHER SHIPPER A RIGHT OF ACTION UNDER THE INTERSTATE COMMERCE ACT TO RECOVER LIKE REBATES ON HIS SHIPMENTS?

2. IF A RIGHT OF ACTION OF THE CHARACTER REFERRED TO IN THE PRECEDING PARAGRAPH DOES ARISE UNDER THE CIRCUMSTANCES MENTIONED THEREIN, DOES THIS EXTEND TO ALL SHIPMENTS MADE BY THE SHIPPER ASSERTING THE RIGHT OF ACTION IN THE PERIOD IN WHICH THE UNLAWFUL REBATES WERE PAID TO THE OTHER SHIPPER WITHOUT REGARD TO THE CONSIDERATION THAT THE REBATES SO PAID

WERE NOT PAID ON ALL SHIPMENTS OF THE OTHER SHIPPER, BUT ONLY ON A PORTION THEREOF?

3. IS A LIKE SERVICE, WITHIN THE MEANING OF SECTION 2 OF THE INTERSTATE COMMERCE ACT, RENDERED BY A CARRIER IN THE TRANSPORTATION FROM THE SAME DISTRICT TO A COMMON POINT OF (a) SHIPMENTS WHICH MOVE OVER A THROUGH LINE MADE UP OF ITS OWN LINE AND THAT OF ANOTHER CARRIER, AND (b) SHIPMENTS WHICH MOVE ONLY OVER THE CARRIER'S OWN LINE?

4. IS A FEDERAL COURT BOUND TO GIVE EFFECT TO A JUDICIAL SALE MADE BY A STATE COURT? OR IS IT AT LIBERTY TO IGNORE THE SALE IF, IN ITS JUDGMENT, THE STATE STATUTES UNDER WHICH THE STATE COURT PROCEEDED TO DECREE AND MAKE THE SALE DID NOT AUTHORIZE A SALE OF THE PARTICULAR PROPERTY OR EFFECTS SOLD?

We shall deal with these issues or contentions in the order in which they have been stated.

1. DOES THE PAYMENT BY A CARRIER TO ONE SHIPPER OF AN UNLAWFUL REBATE GIVE TO ANOTHER SHIPPER A RIGHT OF ACTION UNDER THE INTERSTATE COMMERCE ACT TO RECOVER LIKE REBATES ON HIS SHIPMENTS?

Section 8 of the Interstate Commerce Act confers, and defines the character of, the right of action which can be asserted by shippers because of violations by carriers of any provisions of the Act.

That section reads as follows:

"That in case any common carrier subject to the provisions of this Act shall do, cause to be done or permit to be done any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable *to the person or persons injured thereby* for the full amount of *damages sustained* in consequence of any such violation of the provisions of this Act."

The right of action under the Act is limited to the "person or persons injured," and the recovery to the "damages sustained."

In *Parsons vs. Chicago & Northwestern Railway Company*, 167 U. S. 447, the late Mr. Justice BREWER, delivering the opinion of this Court said:

"The only right of recovery given by the Interstate Commerce Act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this Act.' *So before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.*"

No effort whatever was made in the present case to establish that the defendant in error had sustained any injury as the result of the concessions made to the shippers of contract coal, and it must be apparent that if the effort had been made it would have been unsuccessful.

All the coal in respect to which the concessions were made was absolutely non-competitive. Its sale and delivery had already been contracted for, and the defendant in error consequently was not deprived of the opportunity of making sales of any portion thereof because of the concessions made to those who had contracted to sell it. The allowance

of these concessions had no more injurious effect upon the defendant in error than if the concessions had been made in respect to coal shipped from the coal regions of Pennsylvania to Chicago, defendant in error's shipments having been made from these regions to New York.

Nor was the recovery in the Circuit Court permitted upon the theory that the defendant in error had sustained any injuries as the result of the concessions in question. The question whether these injuriously affected or injured the defendant in error was not submitted to the jury. The recovery was upon the ground that the shippers receiving the concessions were not entitled to lower rates than the defendant in error, and that consequently the latter was entitled to recover a sum which would in effect reduce its rates to those paid by these other shippers.

"If all those elements," (*i. e.*, similarity of service and of circumstance and condition) said the learned trial Judge, in his charge to the jury, "enter into the transportation of property for competing shippers, and one shipper gets a return from the carrier over and above the tariff rate, which is not allowed to the other shipper, then the other shipper can be said to have been injured to the amount of the allowance allowed to its competitor, whether you call it a rebate, a settlement, a repayment or give it any other name." (Transcript of Record, page 366.)

This was a direct instruction that the defendant in error was entitled to recover from the plaintiff in error the amount of the concessions from the tariff rate paid by the plaintiff in error to the shippers of the contract coal and was based upon a view or theory of the law which, we submit, cannot be justified or sustained. The theory of the trial Judge apparently was that if a carrier pays an unlawful rebate or makes an unlawful concession in rates to a shipper, it thereby establishes a new rate which becomes applicable to all shipments in the transportation of which

the carrier renders a like service to that which it rendered in carrying the shipments in respect to which the rebate or concession was paid or made. Such a view, however, wholly ignores the obligation imposed upon the carrier by the Interstate Commerce Act to establish, maintain and charge tariff rates, an obligation which is in no wise varied or affected, we submit, by the failure of the carrier in certain instances to conform thereto.

If a carrier unlawfully refunds to a shipper any part of the tariff rate, it thereby violates the Interstate Commerce Act, but such unlawful act cannot, we submit, be made the basis of an action at the instance of another shipper, the purpose of which is to compel it to repeat its original violation of the Act in order that such shipper may secure also the benefit of a concession in rates which by the terms of the Act the carrier is prohibited from making, and he from receiving.

It is not necessary in the present case to consider whether injury, within the meaning of Section 8 of the Interstate Commerce Act, can be sustained by any shipper who has been charged the proper tariff rate, if competitive shipments are carried for others at lower rates. It may be that if the shipper could show that as the result of the lower rates accorded others he had to sell the goods on which he paid the higher rates at lower prices than it would have been incumbent upon him to do had he not been selling in competition with those who were receiving the lower rates, a case of injury would be made out. But as already pointed out, the present case is not one of that character, and no attempt was made upon the part of the defendant in error to establish any actual injury or damage.

In a case—*Hoover vs. Pennsylvania Railroad Company*, 156 Pa. St. Rep. 220,—which arose under the discrimination Act of Pennsylvania, which contains no provision relative to the establishment and maintenance of

tariff rates, the Supreme Court of that State was required to determine whether the plaintiff in that case was entitled to recover the difference between the rate paid by him and a lower rate charged others, as he claimed, for a like service, merely upon proof of the disparity in the rates paid.

The Pennsylvania Act made the offending carrier liable "to the party injured for damages treble the amount of the injury suffered," and the trial Judge had charged as follows:

"If the nail works (*i. e.*, the shipper which had secured the lower rate complained of) paid 20 cents less per ton freight on their coal they had that much of an advantage over others, and the law would seem in the mind of the Court to fix that excess as the measure of the plaintiff's damages."

This instruction the Supreme Court characterized as serious error.

"The Act of 1883," said Mr. Justice GREEN, delivering the opinion of the Court, "contains no language justifying an instruction that the party injured could recover three times the amount of the difference in the rates charged. The words of the Act are 'Any violation of this provision shall make the offending company or common carrier liable to the party injured for damages treble the amount of injury suffered.' The 'amount of injury suffered' is the measure of the single damages to be allowed. But it does not at all follow that the amount of injury suffered is the difference in the rates charged. It might be or it might not be, but in any event it must be a subject of proof, and there was no proof in the case of the actual damage sustained."

In *Union Pacific Railroad Company vs. Goodridge*, 149 U. S. 680, this Court affirmed a judgment which had been recovered by a shipper who had been charged and

paid higher rates on his shipments than had been charged another shipper who, it was found, was not entitled to the lower rates, such lower rate having been brought about as the result of a rebate, and where the damages recovered had been measured by the difference in the rates paid. But the Statute of Colorado which gave rise to the action contained a provision to the effect that "all concessions of rates, drawbacks and contracts for special rates shall be open to and allowed all persons, companies and corporations alike at the same rate per ton per mile upon like conditions and under similar circumstances," and further provided for the recovery in cases of violation of the Act "of the actual damage sustained or overcharges paid by the party aggrieved." Under this Statute the carrier was not held to a tariff rate, but it was made its duty in case of concessions or rebates to shippers to extend these to all shipping under the same circumstances and conditions.

The decisions of the Interstate Commerce Commission hold that no damages are recoverable from a carrier which has violated the provisions of the Act by charging unequal rates unless the shipper seeking the damages can establish that actual injury resulted to him from such violation.

We shall not encumber this brief with all the decisions of the Commission which have proceeded upon this theory, but will refer to two late ones which are in point.

In *Anaconda Copper Mining Company vs. C. & E. R. R. Co., et al.*, 19 I. C. C. Rep. 592 (1910), it appeared that the complainant, whose works were located in Montana, had been receiving shipments of coke from the West Virginia-Pennsylvania coke field on which a rate of freight had been paid which was made up by combining the rate from the coke ovens to Chicago and the rate from Chicago to the complainant's works.

The rate between the coke ovens and Chicago which was used in this combination was higher than another rate

on coke between the ovens and Chicago, the carriers concerned in the rate having in force two rates, one of which, and the lower, was applied to coke shipped for use in blast furnaces, and the other, or higher rate, to coke which was intended for any other use.

The complainant contended that these two different rates were not justified, and that as it had been charged the higher rate, due to the fact that this higher rate had been used in making up the combined rate, it was entitled to recover the difference between the amounts which it had actually paid and the amount which it would have paid had the lower rate between the ovens and Chicago been used in arriving at the combined rate.

The Commission held that the two rates between the coke ovens and Chicago were not lawful, but it nevertheless held that no damages should be awarded because the complainant had not sustained injury which entitled it to reparation. The grounds upon which this conclusion was reached are disclosed by the following extract from the opinion of the Commission :

"This Commission has always held that it is improper for the carriers to base their charges upon the use to which a commodity may be put, and while the statements and arguments presented by the defendants are persuasive, they do not convince the Commission that our position heretofore taken in this regard should be changed.

"The question remains to be determined whether the complainants are entitled to reparation, regardless of whether the \$2.65 rate was or is unjust or unreasonable in and of itself. The complainants contend that it is illegal, unlawful, and contrary to the act for said defendants to charge a different or greater rate for transporting coke based upon its use, and that the \$2.65 rate was unjust, unreasonable, and discriminatory. They offered no evidence, whatever, to show or prove that the \$2.65 rate was in and of itself unjust, unreasonable, or discriminatory save what appeared on the

face of the tariffs, and left the unjustness, the unreasonableness, and discrimination to be deduced or inferred as a matter of law. The freight traffic managers of the defendants testified that the \$2.35 rate was a very low rate and that the \$2.65 rate was a just and reasonable rate for the service performed and was not in any manner excessive. The average distance from the ovens to Chicago by the lines of the defendants is about 575 miles and the \$2.65 rate yields an average revenue of 4.6 mills per ton per mile.

"Since July, 1903, the open rate on coke over all lines from the ovens in Pennsylvania and West Virginia to Chicago has been \$2.65 per net ton. This rate has been and is the basing rate from said points of origin to Chicago, and for all territory both east and west thereof and has been paid by all consumers of foundry and other than furnace coke continuously during the past seven years and no complaint has been made against it until these proceedings were instituted for reparation. The lower rate of \$2.35 per net ton for use in blast furnaces for smelting iron from the ores was a tariff reduction, effective not earlier than July 1905, and has been applied only to Chicago and vicinity and is a very low rate for the service performed and in and of itself is not deemed conclusive evidence of the unjustness or unreasonableness of the \$2.65 rate.

"Copper and iron cannot fairly be said to compete with each other in view of the fact that iron sells for less than \$20.00 and copper for anything between \$200. and \$500. per ton. There is no pretense in this case that the complainants were engaged in smelting iron from its ores. The allegation in some of the petitions that the complainants are engaged in smelting ores containing copper, silver, gold, and iron, does not place them under the terms of the tariffs providing for the rate on blast furnace coke, and no effort was made on the part of the complainants to show that they ever actually smelted iron from its ores.

"In view of all the facts and circumstances in these cases we are not convinced that the rate of \$2.65 per net ton charged to complainants was either unjust

or unreasonable for the services rendered by the defendants.

"The complaints will be dismissed."

In *International Salt Company vs. Pennsylvania Railroad Company, et al.*, 20 I. C. C. Rep. 539 (1911), reparation or damages were sought by the complainant under the following circumstances:

The defendants in the proceeding had had in force rates on salt from a salt field in New York to Chicago and to Detroit. In a proceeding instituted by the Delray Salt Company, located at Detroit, the Detroit rate had been held by the Commission to be discriminatory by comparison with the rate to Chicago, and its reduction had been ordered and reparation awarded to the salt company, the complainant in that proceeding.

Thereupon the International Salt Company which had also shipped to Detroit under the rate condemned commenced a proceeding to secure reparation, but this was denied by the Commission upon the ground that the Delray Salt Company had been awarded reparation in the original proceeding because not being a shipper under the Chicago rate it had been injured because of the preferential character thereof and was consequently entitled to recover damages, while the International Company had not been so injured because of the fact that it had been a shipper to Chicago as well as to Detroit, and consequently was not in a position to allege that it had been injured as the result of the preferential rate to the former place.

The Commission's conclusion in the matter was thus expressed:

"As the Delray Company was not doing business at Cuylerville, but at Detroit, it was damaged by the eleven cent rate to Detroit, for it had to use that rate in its competition in the market beyond Detroit reached by this complainant under a ten cent rate to Chicago.

We therefore held that the eleven cent rate from Cuylerville to Detroit was discriminatory when compared with the ten cent rate from Cuylerville to Chicago. But the complainant in this proceeding was the shipper that was shown in that case to be getting the benefit of the ten cent rate to Chicago, and was the competitor complained of by the Delray Salt Company. The particular element of damage there shown is therefore altogether lacking in this proceeding. This complainant was competing in Detroit not with the Delray Salt Company, but with the Cuylerville mines and the mines elsewhere in the same salt field in Western New York, all of which then had and now have the benefit of the same rate to Detroit. It seems reasonably clear, therefore, that the complainant here shipped as much salt to Detroit under the eleven cent rate as it could have shipped under the rate of 7.8 cents if that rate had been in effect from all the competing points in Western New York. The complainant here, never having found any objection to the eleven cent rate to Detroit, demanded of it and ail of its rock salt competitors in that salt field, seeks now to come in under Delray Salt Company v. P. R. R. Co., *supra*, and secure the benefit, on its past shipments to Detroit, of our finding in that case. But the two cases are altogether different. In that case, the complainant showed the discrimination or disadvantage to it in competing in the markets beyond Detroit on the eleven cent rate as against the ten cent rate to Chicago. In this case all of the rock salt producers in the salt field in question were reaching and now reach, Detroit on an equal basis. The element of discrimination or of any damage arising out of discrimination is therefore lacking. As was said in *Parsons v. C. & N. W. Ry. Co.*, 167 U. S., 447, at page 460:

"The only right of recovery given by the Interstate Commerce Act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act.' So, before any party can recover under the act he must show not merely the wrong of the carrier but that that wrong has in fact operated to his injury.'"

As we have already had occasion to point out, the lower rates of which the defendant in error is complaining were applied to coal which was absolutely non-competitive, for the defendant in error would not have been enabled to ship a pound of it had it been able to ship at the rates applied to this coal, or, indeed, had the conditions been reversed and had it been in a position to ship the coal at lower rates than were available to those who actually made the shipment of it.

The elements of injury and of consequent damage, therefore, were, we submit, wholly lacking and for this reason the binding instructions which the plaintiff in error asked the trial Judge to give in its favor should have been given.

These instructions were covered by the tenth and eleventh points presented by the plaintiff in error, which were, respectively, as follows:

"Point 10. To entitle the plaintiff to recover anything in excess of nominal damages as to its shipments made after April 1, 1899, the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was carrying at the same time at lower rates coal shipped by other shippers. The plaintiff has not shown that it did sustain any such loss or injury, and it is entitled, therefore, to recover only nominal damages, even if the carriage at such lower rates for other shippers by the defendant was not justified."

"Point 11. Under all the evidence in the case the plaintiff is only entitled to recover nominal damages, and your verdict should accordingly be for only such an amount."

2. IF THE RIGHT OF ACTION ASSERTED IN THE PRESENT CASE IS MAINTAINABLE, DOES IT EXTEND TO ALL SHIPMENTS MADE BY THE DEFENDANT IN ERROR IN THE PERIOD IN WHICH THE UNLAWFUL REBATES WERE PAID

ON CONTRACT COAL, WITHOUT REGARD TO THE CONSIDERATION THAT THESE REBATES WERE NOT PAID ON ALL SHIPMENTS OF THE SHIPPERS SHIPPING CONTRACT COAL, BUT ONLY ON THE PORTION THEREOF WHICH REPRESENTED CONTRACT COAL.

If the defendant in error was "injured" within the meaning of Section 8 of the Interstate Commerce Act by the carriage of the contract coal at the lower rates, and the injury is to be measured by the difference between those rates and the rates which it paid, in arriving at the amount of the injury thus sustained all of the shipments made by the defendant in error should not, we submit, be taken into account.

Upon the trial the defendant in error did not establish what proportion of any shipper's coal had been carried by the plaintiff in error at the rates applicable to contract coal. It did appear from the cross-examination of one of the plaintiff's witnesses—E. J. Berwind, President of the Berwind-White Coal Mining Company, which, as the evidence disclosed was the largest shipper of contract coal—that probably less than ten per cent. of that Company's shipments represented such coal. Mr. Berwind's testimony on this point was as follows:

"Q. While I do not suppose you can give us the actual tonnage shipped under those overlapping contracts and the tonnage which was embraced within them in any year, can you give us about what proportion of your tonnage was covered by the overlapping contracts?

"A. Less than ten per cent. I think considerably less.

"Q. On the balance of your shipments you paid the tariff rate?

"A. We did.

"Q. Without any repayment?

"A. Either direct or indirect."

(Transcript of Record, pages 340 and 341.)

The defendant, after the close of the plaintiff's case, undertook to go into this feature, and the following question was put to the General Coal Freight Agent of the defendant, J. G. Searles:

"Q. Were the adjustments which were made with any other shipper on account of unfilled contracts made on his or its total tonnage?"

An objection was interposed to this question on behalf of the defendant in error upon the ground *inter alia* that evidence on this point was irrelevant, and this objection was sustained by the trial Judge. (Transcript of Record, page 358.)

Upon the theory that, as a basis for the ascertainment and assessment of damages, it was incumbent upon the defendant in error to have shown the proportion of tonnage shipped at the lower rate by the shippers who, it was claimed, had received an undue preference in rates, the plaintiff in error submitted the following point or request to charge:

"Point 7. The plaintiff is not entitled to recover on all its shipments made in any one month or period of time because of the fact that during such time the defendant transported at a lower rate than it charged the plaintiff a portion of the shipments of some other shipper. If such lower rate was not justified the amount which the plaintiff is entitled to recover is measured by the difference in the rate per ton which it paid on all its shipments during such period, and the rate per ton which the other shipper paid on his or its whole volume of shipments during such period.

"As there is no evidence from which the jury can estimate the rate per ton paid on all their shipments by the shippers, a portion of whose shipments were carried

at lower rates than were charged the plaintiff, there is no basis upon which to estimate the amount which the plaintiff is entitled to recover, and it is only, therefore, entitled to recover nominal damages."

The instruction requested should we submit have been given, if the extent of the defendant in error's damages was to be measured with reference to the proportion of other shippers' shipments carried at the lower rate, and if the burden of establishing this proportion rested upon the defendant in error.

If for any reason this burden had been shifted, then the learned trial Judge was in error in sustaining the objection to the question put to the witness Searles, which was intended to elicit what these proportions had been.

All that the defendant in error can properly claim is that it was entitled to be put on an equality with the most favored of its competitors. Would equality result from the application of the theory upon which the Circuit Court and the Circuit Court of Appeals acted in this case?

Assuming that the defendant in error should succeed in sustaining the judgment of the Court below it will necessarily follow that during the period of the action it will have had all its shipments carried at the lower rate applicable to contract coal, while the Berwind-White Company will have had less than 10% of its shipments carried at these rates. That there would be an absolute inequality in this result cannot well be gainsaid.

And in no way that occurs to counsel can the Berwind-White Company recover from the plaintiff in error such a sum as would be necessary to put it on an equality with the defendant in error, for, clearly, it could not maintain an action to recover any portion of the tariff rate which it had paid on the ninety or more per cent. of its shipments, because the plaintiff in error had charged it a lower rate on the remainder of its shipments, nor because the defendant in

error had recovered from the plaintiff in error damages which it had sustained because of the lower rate at which the ten per cent. or less of the Berwind-White Company's shipments had been transported.

The inevitable inequality which would thus result as between the defendant in error and the Berwind-White Company with respect to the charges paid by each for the carriage of their respective coals demonstrates of itself, we submit, the unsoundness of the theory upon which the Courts below acted.

Let us suppose that the defendant in error had had contracts outstanding on April 1, 1899, calling for deliveries of coal to be made thereafter, and that it had made shipments of coal under these contracts and had been charged the lower rates applied to contract coal, and that its shipments of coal of this character had represented the same proportion of its aggregate shipments as had the coal shipped by the Berwind-White Coal Mining Company; how, under these circumstances, would it have been possible for the defendant in error to maintain any action? But if the defendant in error would have no right of action had ten per cent. of its shipments been transported at the lower rates, under the conditions assumed does it not inevitably follow that its recovery in the present case cannot extend beyond ten per cent. of its shipments?

So far as we are aware, the question we are considering has not been dealt with or determined by any Court in this country. It was, however, considered by the English Courts in the case of *Manchester, Sheffield and Lincolnshire Railway Company vs. Denaby Main Colliery Company*, Law Reports, 11 Appeal Cases 97.

In that case the question for determination was whether the carriage of a portion of one shipper's shipments at lower rates than were charged another shipper entitled the latter to recover as to all its shipments, and the views of

the Court of Appeal and of the House of Lords on this subject were as follows:

"It remains only to consider," said LINDLEY, *L. J.*, delivering the opinion of the Court of Appeal, "what damages, if any, the defendants have sustained by reason of the company's reduction of their tolls for the coal carried from the defendant's colliery for Bannister, and shipped at Grimsby for the American steamers. The defendants in fact sent no coals to Grimsby for such shipment, nor did they ever request the Railway Company to carry coals for such shipment. If they had, there is no reason to suppose that they would have been charged more than Bannister. The complaint of the defendant is that the Railway Company prevented it from competing in trade with Bannister; but this is not made out. The Railway Company in no way prevented the defendant from obtaining orders from the Hamburg-American shipping company for South Yorkshire coal. Nor did the Railway Company prevent the defendant from shipping coals to ports south of Harwich on the same terms as regards tolls as Bannister. The fact, however, remains that at various times the Railway Company did carry coals to Grimsby for the defendant and Bannister under the like circumstances as regards trouble and cost to the Company, and as regards coal got from the defendant's collieries over the same portion of the line; and the Company did charge Bannister for the coals so carried for him less than they charged the defendants; and if the defendants had shown that they had thereby sustained pecuniary loss, they would have been entitled to recover damages in respect thereof. The Divisional Court had held the defendant entitled to recover overcharges made to the defendant on the principle laid down in *Evershed's case* (1) *i. e.*, the charges made to them in excess of the charges made to Bannister for similar services. But the Court does not say on what quantity of coal, or on how much of the defendant's coal carried to Grimsby this excess is to be calculated, and we are unable to see how the quantity is to be fixed. This difficulty did not arise in *Evershed's case*

(1); and the principle of that case seems to us inapplicable to the assessment of damages in this case. It cannot be right to calculate the amount of overcharge on all the coal sent by the defendants to Grimsby without reference to the quantity on which, or the times during which, a less rate was charged to Bannister, and, as already stated, we do not see on what principle to fix the amount of alleged overcharge. Under the peculiar circumstances of this case, the defendant has not shown any grounds which will justify the Court in holding the Railway Company liable to it for any overcharges or damages."

In the House of Lords, LORD SELBORNE and LORD BLACKBURN, among others, delivered opinions, from which the following are extracts:

LORD SELBORNE:

"I agree with the arbitrator in holding this to be a case of overcharge, and not a question of damages; and I should answer his question (upon the authority of Sutton's case and Evershed's case, and of the opinion of Lord ST. LEONARDS in Finnie's case) by saying that the proper measure of the overcharge to the appellants is the difference between the amount charged to them, and that charged (after deducting the allowance) to Bannister, for coals carried over the same part of the railway and under the same circumstances, during the same periods of time. Is there, then, any insuperable difficulty arising out of the fact that, during these periods of time, not only the coals on which these allowances were made, but also other coals, on which Bannister was charged the same rates with the appellants, were carried over the same distance, and under the circumstances? I do not think so. *It being known how much coal was actually carried at the reduced rate for Bannister during these periods, it seems to me to result from the principle established in the cases of Sutton and Evershed, that the appellants ought to have been charged at the same reduced rate up to, but not beyond, the same total quantity during*

the same period of time, and that this is the true measure of the overcharge, for which the arbitrator ought to give them credit."

LORD BLACKBURN :

"I think that it can not be right to calculate the amount of overcharge on all the coal sent by the defendants from their colliery to Grimsby for shipment without reference to the quantity of coal on which, or the times during which, the less rate was charged to Bannister, or coal carried from the defendant's colliery."

It will be observed that both LORD SELBORNE and LORD BLACKBURN were of the opinion that the amount of the overcharges paid by the Colliery Company was to be ascertained with reference to the volume of Bannister's shipments which had been carried at the lower rate.

But, we submit, the application of such a rule will not work out equitable results, nor tend to secure an equality of charge.

Take the case of two shippers, one of whom in a given month had shipped 1000 tons of contract coal, while the other had shipped 10,000 tons of non-contract coal. Under the theory propounded in the opinions delivered in the House of Lords, the shipper of the 10,000 tons could recover overcharges on only 1000 tons thereof, with the result that he would have had but one-tenth of his shipments carried at the lower rate, while the other would have had the benefit of the lower rate as to all his shipments.

Of course, the conclusions enunciated in the opinions to which we have referred were expressed in connection with a claim for *overcharge* and not for *damage*, because the House of Lords had determined that the case before it was not one in which damages, as such, were recoverable, and consequently some justification existed for measuring the shipments on which the overcharge had been exacted by

the volume of the shipments which had been carried for some other shipper at a lower rate.

But even in a case of overcharge, we submit that the fairer and more equitable rule is to determine the amount of the overcharge or of the damages, if the case is one in which damages are recoverable, with reference to the service as a whole performed by the carrier whose charges are under consideration.

Take the case which would be presented if it had appeared in the present case that the Berwind White Coal Mining Company had shipped in one month 10,000 tons under a tariff rate of \$1 per ton, 1000 tons of which was contract coal. It paid the tariff rate on the 10,000 tons, or \$10,000, and if the rate on contract coal had been 25 cents per ton less than on non-contract coal, it got back at the end of the month \$250, and the net result, therefore, was that it had secured the transportation of 10,000 tons at a cost of \$10,000 less \$250, or \$9750, equal on an average to 97½ cents per ton.

Now, if in the same month the defendant in error had shipped 1000 tons at the same tariff rate, all of which was non-contract coal, it got back nothing at the end of the month, and consequently the amount which it paid for the transportation of its coal in that month was \$1 per ton, or 2½ cents per ton more than was paid by the Berwind White Company, and it is put on an absolute equality with the Berwind White Company if it gets back or recovers a sum which is measured by 2½ cents per ton on each ton which it shipped.

But if the theory is to be adopted which was accepted and acted upon by the Courts below in the present case, what is the result? The defendant in error, by the recovery of 25 cents per ton on all its shipments, recovers \$250 on account of the 1000 tons shipped in the month, with the ultimate result that it has paid for the transportation of

these 1000 tons an average of 75 cents per ton, as compared with the Berwind White Company's payment of 97½ cents per ton.

The only fair rule to apply, we submit, if exact equality of charge and treatment is the object sought, is to treat the services between which comparison is being made as entireties, and not, in ascertaining the rates paid by the shippers of contract coal, to eliminate consideration of their shipments on which they paid the same rate as the shippers of non-contract coal.

Suppose the case of two shippers, A and B, each of whom had shipped 10,000 tons in a given month, and that the circumstances and conditions required that the same rate should have been applied to all these shipments. The carrier, however, had carried 5000 tons of A's shipments at a lower rate and the remaining 5000 tons at a higher rate than was charged on B's shipments, but the average charge on all of A's shipments had been the same as the amount charged on B's shipments. There would have been an absolute equality of charge as to the entire volume of shipments, but notwithstanding this, if the theory of the Courts below be correct, B could segregate the shipments of A carried at the lower rate and could recover a sum which would result in securing the carriage for him of all his shipments at the lower rate at which A had had half of his shipments carried. And A could also recover in respect to his 5000 tons which were carried at higher rates than those charged on B's shipments

But if, in the case supposed, the actions could be brought by A and B, this incongruity would necessarily seem to result, viz., that B would have recovered upon the theory that the lower rate which had been charged A on a portion of his shipments was the proper rate that should have been charged for the service rendered, while in A's action the recovery would be upon the ground that the

proper rate to be charged was that which B had paid, notwithstanding the fact that in the action brought by B himself this had necessarily been found to have been excessive.

Suppose that all that had been shown in the present case was that the Berwind White Coal Mining Company, we will say, had shipped 10,000 tons and had paid the tariff rate thereon, and at the end of the month had received from the plaintiff in error \$250, which was found to have been an unlawful concession. Could the defendant in error recover the same amount except upon proof that in that month it had also shipped 10,000 tons and had paid the tariff rate thereon?

Would the case be at all different in principle if in connection with proof of the payment of the concession of \$250 to the Berwind White Coal Mining Company it had been shown that this concession was intended to apply to any particular number of tons comprised in the 10,000 shipped?

3. IS A LIKE SERVICE, WITHIN THE MEANING OF SECTION 2 OF THE INTERSTATE COMMERCE ACT, RENDERED BY A CARRIER IN THE TRANSPORTATION FROM THE SAME DISTRICT TO A COMMON POINT OF (a) SHIPMENTS WHICH MOVE OVER A THROUGH JOINT LINE MADE UP OF ITS OWN LINE AND THAT OF ANOTHER CARRIER, AND (b) SHIPMENTS WHICH MOVE ONLY OVER THE CARRIER'S OWN LINE?

Section 2 of the Interstate Commerce Act was intended, to quote from Mr. Justice BREWER's language in the case of *Wight vs. United States*, 167 U. S. 512, "to enforce equality between shippers, and it prohibits any rebate or

other device by which the shippers *shipping over the same line the same distance under the same circumstances of carriage* are compelled to pay different prices therefor."

"That section of our Act," said Mr. Commissioner PROUTY, delivering the opinion of the Interstate Commerce Commission in *Cattle Raisers' Association vs. Fort Worth & Denver Railway Company*, 7 I. C. C. Rep. 513, "corresponds to what is known as 'the Equality Clause' in the English Act. That clause which was enacted before the 'Undue Preference clause,' corresponding to our third section, provided, in substance, that railroads should exact the same compensation for the same service from all persons. The intent of our Second Section is to prevent discrimination between individuals. It prohibits the rendering of a given service to one person for a less compensation than is exacted from some other person for the same service under substantially similar circumstances and conditions. There can be no violation of that Section unless the services are 'like.' *And in order to be 'like' within the meaning of that section, they must be rendered at least over the same line.*"

The evidence in the present case established that the plaintiff in error had for purposes of rate making divided the coal territory tributary to its line into several districts or regions. One of these was known, and is referred to in the testimony, as the "Clearfield Region," and it was from mines in that region which were located directly on the line of the plaintiff in error that all the contract coal referred to in the evidence was shipped. (See Transcript of Record, page 302.)

A portion of the shipments of the defendant in error had been made from mines in this region also located on the line of the plaintiff in error, but a portion thereof, and the larger portion, had been shipped from mines located on the Huntingdon & Broad Top Railroad.

There were in effect joint through rates over the Huntingdon & Broad Top Railroad and the lines of the plaintiff in error, and under the tariffs in force throughout the period of the action the rates under which the defendant in error's coal was transported which originated on the Huntingdon & Broad Top Railroad were the same as the rates from the mines in the Clearfield Region on the railroad of the plaintiff in error. In other words, the Clearfield Region rates were applied to the mines on the Huntingdon & Broad Top Railroad from which the defendant in error's shipments were made.

It was contended by the defendant in error that because the Clearfield Region rates were also in force from mines on the Huntingdon & Broad Top Railroad, and because the district tributary to that railroad was embraced within what was locally or territorially known as the Clearfield Region, it was to be presumed that the services rendered by the plaintiff in error in the transportation to similar destinations of coal shipments from mines on the Huntingdon & Broad Top Railroad was a like service rendered under similar circumstances and conditions to that which it rendered in the transportation of coal from mines on its own road, and the learned trial Judge—erroneously, we submit—so instructed the jury, and he refused to charge in respect to the shipments originating on the Huntingdon & Broad Top Railroad as requested in the plaintiff in error's fifth point, which was as follows:

“Point 5. The burden is upon the plaintiff to prove that the service rendered by the defendant in the transportation of the coal for other shippers on which it charged a lower rate was a like service to that which it rendered the plaintiff. As to the plaintiff's shipments which originated on the line of the Huntingdon & Broad Top Railroad the service performed by the defendant in transporting these shipments was not a like service to that which it performed in transporting shipments originating on its own lines.

and hence the plaintiff cannot recover as to any of its shipments which originated on the Huntingdon & Broad Top Railroad."

It was not denied that the Huntingdon & Broad Top Railroad was a separate and distinct organization. On this point the Secretary of the defendant in error testified as follows:

"Q. You know, as a matter of fact, that the Huntingdon & Broad Top Railroad is a separate organization operated by its own officers, do you not?"

"A. I have always thought so.

"Q. Don't you know, as a matter of fact, that it is?"

"A. Yes."

(Transcript of Record, page 316.)

To this last answer, however, the witness added the following:

"But we did not know it in the freight rates. We did not ask them for freight rates; we never obtained any freight rates from them. There was no difference in getting a freight rate on Broad Top shipments from a Sonman or Clearfield County shipment."

And he had previously, with reference to the freight rates, testified as follows:

"Q. Taking up the matter of the Huntingdon & Broad Top, they were in the Clearfield Region?"

"A. Yes, under the tariff rates.

"Q. And your dealing as to freight was entirely with the Pennsylvania Railroad,—that is to say, the Pennsylvania Railroad fixed a rate which covered the movement on the Huntingdon & Broad Top?"

"A. Yes."

(Transcript of Record, page 313.)

The fact, if it was a fact, that the Huntingdon & Broad Top Railroad Company permitted the plaintiff in error to establish and quote through rates from points on its line, and the further fact that it was the practice of the officers of the defendant in error, to obtain freight rates from the plaintiff in error and not from the Huntingdon & Broad Top Railroad Company, does not tend to establish in the remotest degree a similarity of service as between the transportation from mines on the Huntingdon & Broad Top Railroad and that from mines on the line of the plaintiff in error.

The plaintiff in error may have had everything to do with fixing and promulgating the rates, and yet this did not and could not alter or affect the fact that in the case of the shipments over the lines of the two companies, the service was a joint service over a line made up of their two railroads, while in the case of the other shipments, the service was a local service of the plaintiff in error, and the transportation was over its line alone.

If the services in the two cases were like services rendered under substantially similar circumstances and conditions, it would necessarily follow that different tariff rates could not have been legally applied to the shipments which originated on the Huntingdon & Broad Top Railroad from those which originated on the lines of the plaintiff in error, and yet it is, we submit, indisputable—the decisions of the Courts and of the Interstate Commerce Commission are uniformly to this effect—that varying tariff rates could be applied in the case put without violation of the provisions of the Interstate Commerce Act.

In the case of *Railway Company vs. Osborne*, 52 Fed. Rep. 912, the late Mr. Justice BREWER, delivering the opinion of the Circuit Court of Appeals for the Southern District of Iowa, said:

“Where two companies owning connecting lines of railroad unite in a joint through tariff, they form

for the connected roads practically a new and independent line. Neither company is bound to adjust its own local tariff to suit the other, nor compellable to make a joint tariff with it. * * * What we mean to decide is that the through tariff on a joint line is not the standard by which the separate tariff of either company is to be measured or condemned."

In *Tozer vs. United States*, 52 Fed. Rep. 917, the same learned Justice, delivering the opinion of the Circuit Court of Appeals for the Eastern District of Missouri, said, after referring to the decision in the Osborne case:

"It was there held that each company established its own tariff and that the reasonableness of the tariff of one is not determined by that of any other. It was also held that two connecting companies forming by agreement a joint through tariff create thereby, as it were, a line new and independent of that of either of the connecting companies, and hence that such joint tariff, or the share which either takes of such tariff, is not the basis by which the reasonableness of its local tariff is to be determined. It is true that in that case the question arose under Section 4, with reference to long and short hauls, while in this it arises under Section 3, prohibiting undue and unreasonable preferences or advantages; but still the questions there decided are controlling here. If the joint through tariff of two connecting roads is not a standard by which the local tariff of either can be declared in violation of Section 4, neither can it be the standard by which the question of undue preferences is determined under Section 3."

And in the case of *Parsons vs. Chicago & Northwestern Railway Company*, 63 Fed. Rep. 903, Judge THAYER, delivering the opinion of the Circuit Court of Appeals for the Eighth Circuit, thus summarized the result of the authorities, especially the decisions in the cases last alluded to:

"It was held in both of the cases last cited that a question of undue discrimination must be determined

by other considerations than the mere disparity that may exist between a local rate and a joint through rate, and that it never follows, as a matter of law, that an undue preference has been given to a person or locality because a disparity is shown to exist between a local rate and a joint rate."

As it would, therefore, have been entirely unobjectionable for the plaintiff in error to have had in force tariff rates on its own lines lower than from the mines on the Huntingdon & Broad Top Railroad to the same destinations, no right of action can be maintained because of the carriage by the plaintiff in error of the contract coal from the mines on its own line at rates lower than were paid by shippers whose coal originated on the Huntingdon & Broad Top Railroad.

The learned trial Judge gave undue weight to the similarity in the tariff rates. Even if the mines on the line of the plaintiff in error and those on the line of the Huntingdon & Broad Top Railroad could be regarded as having been grouped for rate making purposes, this fact of itself would not have the effect of establishing that the services rendered in the transportation from these mines were like within the meaning of the Interstate Commerce Act, even if we were to ignore the dissimilarity resulting from the consideration we have been considering.

In the case of *Detroit etc. Railway Company vs. Interstate Commerce Commission*, 74 Fed. Rep. 803, the Circuit Court of Appeals for the Sixth Circuit was required to determine whether the establishment of a group rate by the railway company in that case justified the presumption that the services rendered in connection with the transportation of traffic to and from the points so grouped were to be regarded as "like" within the meaning of the Interstate Commerce Act, and the conclusion reached by the Court was thus expressed:

"Grand Rapids and Ionia have been thus grouped, and the decision in the court below and before the commission treated this grouping as a conclusive admission by the railroad company that the transportation from station to station is under substantially similar circumstances and conditions; and because of that admission it necessarily follows that if the rate at Grand Rapids includes a charge for cartage which is not furnished at Ionia as well, the cost of that service being deducted, this section is violated. The grouping which was allowed does not, we conceive, result in such a formidable estoppel as that suggested. It is a question of fact—always a question of fact—whether the circumstances and conditions are substantially similar or dissimilar * * *."

The decisions of the Interstate Commerce Commission clearly recognize the principle that a rate for a through haul over two connecting roads may and indeed is expected to be higher than the rate between the same points over but one road; in other words, that the transportation in the two cases is not a "like service," nor performed under substantially similar circumstances and conditions. There have been many decisions to this effect. We shall here refer to but two, in one of which the facts were closely analogous if not entirely similar to those of the present case.

In *Loup Colliery Co. vs. Virginian Ry. Co. et al.*, 12 I. C. C. 471, an application was made, supported by one of the defendants, the Virginian Railway, for the establishment of joint through rates over that railway and the Chesapeake & Ohio Railroad between Page, West Virginia, a point on the Virginian Railway nine miles from its junction with the Chesapeake & Ohio Railroad, and points outside of West Virginia, which should be the same as those in effect from points on the main line and branches of the Chesapeake & Ohio Railroad in the same coal district.

The complaint was dismissed, and in the course of its opinion the Commission said, at page 477:

"It is claimed that the result here sought is necessary to put the operators on each of these roads in this district on a parity, the withholding of which under existing conditions would be unjust discrimination. However desirable it might be in some respects for the coal operators in an entire district to have the same rates from all points, particularly where they are not separated by great distances, we do not understand that the prohibitions of the statute against unjust discriminations in connection with the provisions for the establishment of through routes and joint rates were intended to force separate and independent carriers in such a district to make the same rates from points on their respective lines, ignoring inequalities in other respects. Such a ruling would in many cases, as in this, totally disregard the long-established practice, recognized as reasonable and just by legislatures, railway commissions and courts, as well as carriers, of allowing two or more roads making up a through line to charge somewhat more for the through transportation, the earnings on which must be divided among all, than would be deemed reasonable and sufficient for the transportation if performed wholly by a single road."

The same general principle was again enunciated by the Commission in the case of *Cedar Rapids, etc. Ry. Co. vs. C. & N. W. Ry. Co.*, 13 I. C. C. 250 (1908), where at page 255 the Commission said:

"Nevertheless some recognition must be given to the well-established rule that joint rates over two or more connecting lines may and ought ordinarily to be higher than the rate on one-line movements."

It follows, therefore, we submit, that the fifth point of the plaintiff in error should have been affirmed, not refused.

The Circuit Court of Appeals, while it affirmed the rulings of the trial Judge in respect to the similarity of service rendered by the plaintiff in error in respect to shipments originating on its own line and those originating on the line of the Huntingdon & Broad Top Railroad, rested its conclusion not upon the view or theory adopted by the trial Judge, but upon the theory that under the evidence in the case the railroad of the Huntingdon & Broad Top Railroad Company was to be regarded as part of the railroad of the plaintiff in error for the purposes of the present case because of the provision embodied in the first section of the Interstate Commerce Act that the term "railroad" as used in the Act should include "all the road in use by any corporation operating a railroad whether owned or operated under a contract, agreement or lease."

The Court will observe that in order to bring the present case within the purview of this provision of the Interstate Commerce Act it must have been made to appear that the railroad of the Huntingdon & Broad Top Railroad Company was either "owned or operated" by the plaintiff in error.

There was no evidence tending to show ownership, and as to operation, the only evidence on the subject was that the Huntingdon & Broad Top Railroad Company was a separate organization, and its operations were conducted by its own officers.

The Court of Appeals in the opinion delivered by it referred to the testimony which it considered had a bearing upon the question, which was that which we have already quoted, and which amounted, we submit, to nothing more than this, that it had been the invariable habit of the officers of the defendant in error to obtain freight rates for its shipments from the plaintiff in error, and that the practice of the plaintiff in error in naming rates on coal originating on the Huntingdon & Broad Top Railroad in

no sense differed from that which prevailed in respect to rates on coal which originated on its own lines. Even if the evidence upon which the Court of Appeals relied had a tendency to establish ownership or operation of the Huntingdon & Broad Top Railroad by the plaintiff in error, the question as to the existence of such ownership or operation would at least have been one for the jury. Indeed, the Circuit Court of Appeals seems to recognize this, because it says in its opinion, referring to the facts which the evidence in its opinion tended to establish, "by such acts *the jury had a right to infer* that the Broad Top Railroad was, so far as the purposes of this case went, and for freight purposes, a part of the Pennsylvania Railroad system."

But the Court overlooked the fact that the question whether the Broad Top Railroad, as it styled it, was a part of the system of the plaintiff in error, had not been submitted to the jury. The proposition which the Court of Appeals relied upon was not presented to or urged upon the trial Judge. The question of fact that he submitted to the jury in connection with the Huntingdon & Broad Top shipments had reference solely to the question whether the point on the Huntingdon & Broad Top Railroad at which the defendant in error's shipments originated was or was not within the Clearfield District.

"You will say," said the learned Judge in his charge to the jury, "whether the evidence shows it (*i. e.*, point of shipment) is in the district or is not in the district. If it is in the district the shipments from that point would be from the same initial point. If it is not in the district, they would not be from the same initial point. It is a matter for you."

But we submit that it would have been error even to have submitted the question to the jury upon the evidence which had been adduced in the case. The fact that the plaintiff in error was a party to the rates under which the

coal moved which originated on the Huntingdon & Broad Top Railroad, furnished to the officers of the defendant in error all information required by them as to these rates, and that all the dealings of these officers had been with the officers of the plaintiff in error in all matters affecting rates fell far short of establishing that the plaintiff in error was operating the Huntingdon & Broad Top Railroad.

This Court is familiar with the system in vogue all over the country under which railroad companies join in establishing through rates over their lines. The fact that such rates are entered into, of course does not tend in the remotest degree to establish that either one of the companies parties thereto is engaged in operating the railroad of the other. On the contrary, the existence of the joint rates is really evidence to the contrary. The fact, therefore, that one of the companies parties to such a through rate undertakes to name rates to inquiring shippers is of no possible significance as tending to establish anything more than the fact that that company is itself a party to such a rate.

If, in the present case, the fact that the plaintiff in error named rates under which coal originating on the Huntingdon & Broad Top Railroad was shipped is of the least importance in determining the question whether it was operating the Huntingdon and Broad Top Railroad, then it would seem necessarily to follow that if it had happened that the dealings of the officers of the defendant in error had been exclusively with the Huntingdon & Broad Top Railroad Company in respect to rate matters, that circumstance would have been evidence to establish the fact that that company was operating the railroad of the plaintiff in error. If the plaintiff in error had actually been operating the Huntingdon & Broad Top Railroad during the period of the action, it would have been the easiest thing in the world for the defendant in error to have submitted proof

to this effect. It did not undertake to do this, and, as a matter of fact, did not even contend that under the proof which it had offered such a finding was permissible, and the view upon which the Circuit Court of Appeals acted was really of its own motion and not as the result of any insistence on behalf of the defendant in error.

Even if it were inferable from the evidence that the plaintiff in error would have carried shipments of contract coal originating on the Huntingdon & Broad Top Railroad at the lower rates which were actually applied to shipments of this coal which originated on its own lines, the right of the defendant in error to recover as to its shipments from points on the Huntingdon & Broad Top Railroad would not be thereby established.

Drinker on the Interstate Commerce Act (1909), section 124:

"In order to constitute a violation of the prohibition of Section 2 against different charges to different persons, it must appear that one individual has actually received some transportation service at a less charge than another, and such is not the case where it merely appears that a less rate was offered to others, no shipment having been made at the reduced rate."

Judson on Interstate Commerce (1905), section 245:

"The discriminating rate must be actually charged to make an offense or cause of action under the act. Merely making or offering an illegal rate when it is not shown that an actual shipment was made, constitutes no legal injury to a shipper who was charged a higher rate. *Lehigh Valley R. Co. vs. Rainey*, 112 Fed. Rep. 487, E. Dist. of Penn."

To the same effect are :

Beale & Wyman, Railroad Rate Regulation (1906), section 943.

Nelson on the Interstate Commerce Commission (1908), page 70.

Barnes on Interstate Transportation (1910), section 428, paragraph D.

The view embodied in the extracts above referred to is that upon which the Interstate Commerce Commission acts. See *Griffee vs. Railroad*, 2 I. C. C. R. 301, and *Missouri, etc., Association vs. M. K. & T. Ry.*, 12 I. C. C. R. 483.

In the latter case the Commission held that even a rate formally established and promulgated, under which, however, no shipments had been moved, could not be treated as a violation of the long and short haul clause of the Interstate Commerce Act, although a higher rate had been applied to the shipments of the complainant which had moved over a shorter and included distance.

A like rule was followed by the English courts. In *Taylor vs. Metropolitan Railway Company*, 1906 Law Reports 2 King's Bench Division 55, a shipper who had been charged a certain rate on coke breeze sought to recover on the ground of inequality of charges because a lower rate on the same commodity when shipped for fuel purposes could be secured. There was no evidence that shipments had been actually carried by the railway company at the lower rates, and because of this fact it was held that the plaintiff was not entitled to recover.

"It seems to me," said Mr. Justice KENNEDY, delivering the opinion of the Court, "that there was no evidence given at the trial to establish the inequality of charges of which the plaintiff complains. In my view it is not sufficient to show that the railway com-

pany had in their books a rate, which they call 'the rate in force,' in the sense that it was the charge that they were prepared to make for the carriage between these two stations of coke breeze used for fuel. It lay upon the plaintiff to show that goods of that description had in fact been carried for some customer at the lower rate during the period of the payments now sought to be recovered back. And of that the mere existence of such a rate in the company's rate-book is, in my opinion, no evidence."

4. IS A FEDERAL COURT BOUND TO GIVE EFFECT TO A JUDICIAL SALE MADE BY A STATE COURT? OR IS IT AT LIBERTY TO IGNORE THE SALE IF, IN ITS JUDGMENT, THE STATE STATUTES UNDER WHICH THE STATE COURT PROCEEDED TO DECREE AND MAKE THE SALE DID NOT AUTHORIZE A SALE OF THE PARTICULAR PROPERTY OR EFFECTS SOLD?

That the Court of Common Pleas of Philadelphia County did, as a matter of fact, direct the sale, *inter alia*, of all "claims, choses in action and causes in action arising out of contracts, torts or penalties" of the defendant in error, and that pursuant to such order such a sale was had, cannot be successfully denied.

The order or decree directing the sale will be found at page 168 of the Transcript of Record, and immediately following this order will be found a copy of a petition of the defendant in error, addressed to the Court which had directed the sale, setting out that the only asset which the petitioner possessed was the claim against the plaintiff in error which is the subject matter of the present action, that such claim would be sacrificed if sold in the manner proposed, and praying that for reasons disclosed in the petition the sale be stayed.

This petition was denied by the Court, as appears from the order which will be found at page 170 of the Transcript of Record, and the return made by the Sheriff showing the sale of all of the property of the defendant in error, including its "claims, choses in action and causes in action arising out of contracts, torts or penalties" will be found at page 171 of the Transcript of Record.

It is clear, therefore, that a sale of the claim embraced in this action was made, and our contention was and is that the Circuit Court was required to give effect to this sale, and was not at liberty to ignore or disregard it.

The defendant in error, by its replications to the plea which had set up this sale as a bar to the prosecution of the action, set forth various matters which it averred justified the Circuit Court in disregarding or ignoring the sale. In the first place, it was averred that the sale was brought about through and by means of an alleged fraudulent combination or conspiracy between the plaintiff in error in this case and the plaintiff in the action in which the sale was had, but clearly this averment raised no issue which the Circuit Court below could take cognizance of. If, in point of fact, the sale had been the result of a combination or conspiracy which, if established, would have invalidated it, the only tribunal which could grant relief would be the Court which had been imposed upon or deceived and which had been thus induced to make the order of sale.

And the same criticism may be made as to the allegation made in the replications respecting the existence of unpaid State taxes. If the existence of these taxes did operate to invalidate the sale, relief could only be secured through the Court which had made it.

Another fact set up in the replications as a ground for invalidating the sale was the order adjudicating the defendant in error a bankrupt made within four months after the sale, this contention being rested upon the provision of the

bankruptcy law which provides "that all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same and shall pass to the Trustee as a part of the estate of the bankrupt, unless, etc."

It will be observed that the annulment thus provided for does not extend to sales under or pursuant to judgments, and *In re Bailey*, 144 Fed. Rep. 214, it was held by the District Court for the District of Oregon, that this section did not apply to a case where a Sheriff had sold property under an execution and had delivered it to the purchaser before the institution of the bankruptcy proceedings, and in the present case all these proceedings had been had before the bankruptcy proceedings against the International Coal Mining Company were initiated.

But even if this section had any application to the present case, is it not clear that the Trustee in Bankruptcy, before he could assert any rights under the claim which had been sold, must, by some proper proceeding, recover this claim from the purchaser, or establish his right as against the purchaser to assert the same against the debtor? Manifestly, the Trustee could not ignore the sale made by the State Court, and proceed as if it had never taken place, for even if the validity of the sale was open to attack, the purchaser thereat must have his day in court, and this he could only have in a proceeding between him and the Trustee, in which the issue involved was the validity of the sale and of the title acquired thereunder.

It would seem to be clear, therefore, that the mere initiation of the proceedings in bankruptcy, within a period of four months after the sale and the subsequent adjudication

of bankruptcy, did not, of themselves, operate to vest in the Trustee title to the claim on which the present action is founded, which title had passed to a third person under the judicial sale referred to prior to the institution of the bankruptcy proceedings.

The Circuit Court in overruling the demurrer to the replications did not refuse to give effect to the sale made by the Court of Common Pleas of Philadelphia County on any of the grounds above referred to. The sale was held invalid and void because, in the judgment of that Court, the Court of Common Pleas of Philadelphia County had no authority to make sale of the choses and claims in action of the defendant in error, this conclusion being rested upon a decision of the Supreme Court of the State of Pennsylvania which, in the opinion of the Circuit Court, had determined that sales of choses and claims in action of a defendant could not be made pursuant to the Statute of Pennsylvania under which the sale of the defendant in error's choses and claims in action had been made. (Transcript of Record, p. 139.)

Waiving, for the moment, the question of the right of the Circuit Court to review the correctness of the conclusion reached by the Court of Common Pleas of Philadelphia County as to the scope and effect of this statute, we submit that the decision relied upon by the Circuit Court did not establish that the Court of Common Pleas had misconstrued the terms of the statute under which it acted. The case thus relied upon was *Hogg's Appeal*, 88 Pa. St. 195. In that case the question to be determined was whether there had been a sale of debts or choses in action due to a railroad company against whom proceedings in the way of execution process had been had under a statute of the State of Pennsylvania passed in 1870, which constituted the basis for the execution proceedings against the defendant in error which we are concerned with. A *per curiam* opinion was deliv-

ered by the Supreme Court of Pennsylvania, in the course of which it was said that the sale which was under consideration in that case "*did not* pass to the purchaser the debts or mere choses in action due to the company from others." The Court did not say that the sale it was considering could not have passed such choses in action, but only that it did not, and that the conclusion reached was quite justified is evident from the statement of the case which is embodied in the report, from which it appears that the execution and sale made thereunder had extended by terms only to the *railroad* of the defendant; no attempt had been made to embrace the claims or choses in action, and consequently the question whether such claims or choses in action could have been sold was not before the Court.

But assume for the sake of argument that error had been committed by the Court of Common Pleas of Philadelphia County, and that under a proper construction of the statute under which it was acting the choses in action and claims in action of the defendant in error were not the subject of sale, or that the sale had been brought about by some combination or conspiracy which, when established would have resulted in the setting aside of it, can it be possible that any other Court than that which made the sale, can at the instance of, and for the benefit of, a party to the proceeding in which the sale was had, and in the absence of a party vitally interested, to wit, the purchaser at the sale, take under review the proceedings had in the case with the view of correcting the wrong done or the error committed by the other Court?

Such a view is opposed, we submit, to an unbroken current of decisions of this Court.

In *Nowegue vs. Clapp*, 101 U. S. 551, this Court held that the Circuit Court of the United States for the District of Louisiana could not entertain a bill, the purpose of which was to obtain relief from the effect of a sale made under the

order of a State Court of Louisiana in a proceeding to which the plaintiff in the case, in the Circuit Court, had been a party, the allegation being that the sale was void because of an alleged fraudulent conspiracy to cheat him out of a lien on the land sold.

"The main purpose of this Bill," said Mr. Justice MILLER, "perhaps its only real object, is to have the proceedings in the State Court declared void.

"That Court had jurisdiction of the parties and of the subject matter of the controversy. Complainant in this bill entered his appearance in that suit at a proper stage of it, to enable him to contest the right of Clapp to have the property sold. The debt for which it was to be sold was complainant's debt to Clapp.

"The usual mode in the Courts of Louisiana of contesting the right to foreclose a mortgage is by obtaining an injunction, after which the rights of the parties are judicially determined by the Court. Complainant appeared and obtained an order for such an injunction.

"If this order was not obeyed it was for that Court, not this, to give remedy. If the Court below refused to do it, there was an appeal to the Supreme Court of the State. After the sale he could, by a motion of the court, have had it set aside; and that was the proper place for such a remedy.

"The laws of Louisiana also provide a remedy by a special proceeding, to have a declaration of nullity of judgment in such cases as this in the court where the decree is entered. There is no allegation that the plaintiff sought any of these remedies.

"We think that for this court, after all this has been done, to undertake to decree that what that court did is void, to sit in review on its judgment, and reverse its decree and set aside its sale, in a case where its jurisdiction is undoubted, is unwarranted by the relations which subsist between the two courts. It would be an invasion of the powers belonging to that court, and such a doctrine would, upon the simple allegation of fraud practiced in the court, enable a party

to retry in a Federal court any case decided against him in a State court."

In *Herron vs. Dater*, 120 U. S. R. 464, in an action of ejectment, the plaintiff, in order to sustain his title, introduced the record and proceedings of the Orphans' Court of Philadelphia County which had resulted in a sale and conveyance of a part of the land in controversy. The admission of this record was objected to upon the ground that it appeared from the face thereof that the debts, for the payment of which the sale had been made, were barred by the Statute of Limitation, and that, as a consequence, the Orphans' Court had had no jurisdiction to make the order of sale. The record was received in evidence and its admission was assigned as error. In dealing with this assignment this Court said:

"It is scarcely necessary to cite authority in support of the proposition that the orders, judgments, and decrees of the Orphans' Court, in a case where it had jurisdiction of the subject-matter, cannot be impeached collaterally; much less is it so in the present case, because the statute of Pennsylvania of March 29, 1832, 2 Brightly's Purdon's Digest, p. 1279, pl. 3 (11th ed.), provides as follows: 'The Orphans' Court is hereby declared to be a court of record, with all the qualities and incidents of a court of record at common law; its proceedings and decrees in all matters within its jurisdiction shall not be reversed or avoided collaterally in any other court; but they shall be liable to reversal or modification or alteration on appeal to the Supreme Court, as hereinafter directed.' * * *"

In *Randall vs. Howard*, 2 Black 585, it appeared that the owner of land encumbered with a mortgage had arranged with the mortgagee that the mortgage should be foreclosed and the land bought in by the mortgagee for account of, and for the benefit of, the mortgagor; that pursuant to this arrangement the land had been so acquired

through and by means of a proceeding in a State Court, and that thereupon the mortgagee, in violation of the agreement, had proceeded to deal with it as if it were his absolute property, in violation of his agreement to the contrary.

The mortgagor, or former owner, thereupon filed a bill in the Circuit Court of the United States for the Eastern District of Maryland, seeking redress.

In this proceeding it was not sought to attack or revise in any way the proceedings in the State Court which had eventuated in the sale of the land and its purchase by the former mortgagee; but, notwithstanding this, this Court held that the proceeding could not be sustained for the reasons which are sufficiently disclosed by the following extract from the opinion delivered by it:

•“The Bill in this case brings in review various matters passed on in the progress of the suit by the Cecil County Circuit Court, a court of general jurisdiction, having complete control of the parties and of the subject-matter of the controversy.

“It seeks to annul a sale of lands made by virtue of a decree of the Cecil court, sitting as a court of equity, in a cause depending between the same parties; to effect the distribution of the proceeds of the sale, to enjoin the defendant from making any disposition of the lands purchased by him; to disturb his possession, to invalidate his title, and to have the property resold.

“This is a direct and positive interference with the rightful authority of the State court. If there were error in the proceedings of the court a review can be had in the appellate tribunals of the State. If, as is charged, the decree is sought to be perverted, and made the medium of consummating a wrong, then the court on petition or supplemental bill can prevent it.”

Other decisions to the same effect could be cited, but the above clearly indicate the rule which this Court has consistently applied when it was required to determine the

effect to be given to acts or judgments of State Courts.

The rule adopted accords with the universally accepted theory as to the conclusiveness of judgments and judicial proceedings when attacked collaterally.

In *Freeman on Judgments*, Section 334, the rule is thus stated :

"The parties to an action cannot impeach or set at naught the judgment in any collateral proceeding on the ground that it was obtained through fraud or collusion. It is their business to see that it is not so obtained. If, without any fault or neglect of one party, his adversary succeeds, by fraud, in obtaining an inequitable and unauthorized judgment, he must take some proceeding prescribed by law to annul the judgment, and cannot, in the absence of such annulment, treat it as invalid. It is only third persons who have the right to collectively impeach judgments. They are accorded this right because, not being parties to the action, nothing determined by it is, as to them, *res adjudicata*. The rule is correctly stated in Cowen, Hill and Edwards's note 291 to Phillips on Evidence, as follows: 'Judgments of any court can be impeached by strangers to them for fraud or collusion; but no judgment can be impeached for fraud by a party or privy to it.' A party to a judgment, feeling himself aggrieved thereby may, in a proper case, either move that it be vacated, or prosecute an appeal or writ of error, or maintain a suit in equity to enjoin its enforcement. These, unless the judgment is void on its face, are the only remedies open to him, and if he resorts to neither, or resorting to any or all he is denied relief, he cannot avoid the judgment, when offered in evidence against him, by proving that it ought not to have been pronounced, and was procured by fraud, mistake, perjury or collusion, or through some agreement entered into by the prevailing party, and which he neglected or refused to perform."

And in Section 337 as follows:

"The parties to an action or proceeding, and all persons who, though not parties thereto, are not prejudiced by the judgment when rendered, will not be permitted to assail or avoid it in any collateral proceeding for error or irregularity, unless it was such as left the court without jurisdiction and the judgment absolutely void as between the parties thereto."

And so this Court in *Elliott vs. Peirsol*, 1 Peters 328, held that "Where a Court has jurisdiction it has the right to decide any question which occurs in the cause, and whether its decisions be correct or otherwise, its judgments, until reversed, are regarded as binding in every other Court."

The conclusiveness of the proceeding in the Court of Common Pleas of Philadelphia County, to which we have referred, upon the right of the defendant in error to thereafter maintain any action upon its claim against the plaintiff in error was recognized by a State Court in Pennsylvania, the Court of Common Pleas No. 2 of the County of Philadelphia, the sale having been made by the Court of Common Pleas No. 1 of that county.

At the time the sale in question was made, an action was pending which had been brought by the defendant in error in the Court of Common Pleas No. 2 to recover in respect to its State shipments because of the matters relied upon by it in the present action. In this action the sale made by Common Pleas No. 1 was set up as a bar to a further prosecution of the action, and was accepted as such by that Court.

"We are of the opinion," said the Court of Common Pleas No. 2, "that the only issue thus presented to us is to be tried by this record (*i. e.*, of the Court of Common Pleas No. 1), that the record discloses the divestiture of the assets by operation of law, and that we are bound by the same, and are without jurisdic-

tion to examine it and modify its effect or to annul the change wrought in the status of the plaintiff."

While the Circuit Court undertook to, and did, exercise the right of supervising the proceedings had in the Court of Common Pleas No. 1 for the County of Philadelphia, and as a result of doing so reached the conclusion that the sale made by that Court was invalid and consequently ineffective, the Circuit Court of Appeals, while declining to treat the sale as a bar to the action, rested its conclusion not upon the ground on which the Circuit Court had proceeded, but upon the ground that, as the sale had not had the effect of relieving the plaintiff in error from liability to someone, it was immaterial to it whether that someone was or was not the defendant in error.

It may be conceded for the purposes of the argument that if the legal title to the claim remained in the defendant in error, it could continue to prosecute the present action; but in that event it was clearly, we submit, incumbent upon it to do so in such a manner as to permit the beneficial owner—viz., the purchaser at the sale—to in some way control the action, otherwise such beneficial owner would be in the position of having the validity of his claim adjudicated in an action to which he was not a party and over which he could exercise no control. And of course if the defendant in error was entitled to maintain the action, the judgment finally entered therein, whatever it was, would be conclusive as against any other owner of the claim.

Upon the theory or assumption, therefore, that the beneficial ownership merely of the claim passed to the purchaser at the sale, it was incumbent upon the defendant in error, if its purpose in the further prosecution of the case was to recover for the benefit of such beneficial owner, by proper proceedings to have had such owner made a party to the case as a "use plaintiff." This, of course, it failed to do, and indeed such action on its part would have been

in direct conflict with the theory upon which it was proceeding, namely, that the sale was void, and that it consequently still remained the owner not merely of the legal, but of the beneficial title to the claim.

It will doubtless be admitted that if the legal title to, and not merely an equitable interest in, the claim which forms the basis of the present action passed to the purchaser at the sale, then the action was not maintainable thereafter by the defendant in error, for, as was said by the Supreme Court of Pennsylvania in the case of *Guarantee Trust Company vs. Powell*, 150 Pa. St. 16, "There is no precedent for putting the cart before the horse by allowing the legal plaintiff without title of his own to recover on the title of the plaintiff to use." If, therefore, the legal title to the claim did pass, the present action could not have been prosecuted by the defendant in error even though the purchaser at the sale had been added as the use plaintiff.

Did, then, the legal title to the claim embraced in the present action pass to the sheriff's vendee as the result of the sale made under the order of the Court of Common Pleas of Philadelphia County?

We fail to see how it can be successfully contended that the sale had any other effect. It will not, we assume, be denied that it was within the power of the Legislature of Pennsylvania to make provision for the sale of the absolute or legal title to claims and choses in action of a defendant in a judgment. Indeed, it has been expressly held in Pennsylvania in the case of *Levy vs. Levy*, 78 Pa. St. 507, that an assignee of a chose in action obtains the legal title thereto and is consequently empowered to institute actions in his own name when the assignment is made in a state

in which the assignee is recognized by its statutes as the legal owner. In the case referred to, the Supreme Court of Pennsylvania, in conformity with decisions rendered by the higher courts of the State of New York, held that an action upon a book account which had been assigned was properly brought in the name of the assignee thereof, the assignment having taken place in the State of New York, because it was provided by the Code of that State that "Every action must be prosecuted in the name of the party in interest, except as is otherwise provided by Section 131, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of a contract."

"The weight of authority," said the Supreme Court of Pennsylvania, "in the New York State Courts is very decided that the legal as well as the equitable title passes by an assignment of a chose in action under their Code. This is decisive of the case. The rule in this State is that the suit must be brought in the name of the holder of the legal title. If the plaintiffs were the holders of the legal title by the law of the State of New York where the assignment was made, they are the holders of it here, and their suit was well brought."

In the present case the judicial sale passed to the purchaser the legal title, we submit, to the choses and claims in action of the defendant in error. The order of the Court under which the sale was made directed the sheriff "to levy upon and to sell all and singular the chartered rights, privileges and franchises of the said International Coal Mining Company, including the franchise right to be a corporation, together with all property, real, personal and mixed, and all book accounts, claims, choses in action, causes in action, arising out of contracts, torts or penalties, and assets of every description belonging to or in any way appertaining to said International Coal Mining Company, excepting only lands held in fee."

How can it possibly be successfully argued that this sale did not pass the legal title to the claim which is sought to be enforced in the present action, especially when by such sale the "franchise right to be a corporation" of the defendant in the execution passed to and became vested in the purchaser? It would certainly be anomalous to treat the sale made as intended to pass merely the equitable title, leaving the legal title in a corporation whose very existence would be terminated by the sale.

And apart from this consideration, is it conceivable that the Legislature intended that a purchaser of a claim or chose in action should only be at liberty to proceed thereon in any court in the name of the defendant in the execution? It can hardly be assumed that the latter would be very desirous of co-operating in proceedings intended to secure for others the proceeds of claims of which he had been deprived by judicial sale, and unless required to do so by reason of the language of the statute, courts, we submit, ought not to adopt a construction which would put the purchaser in such a position.

The State Court in which the action was pending which had been brought by the present defendant in error to recover as to its State shipments because of the lower rates on contract coal held that the action could not be prosecuted after and because of the sale.

"What we decide is," said the Court in that case, "that the sale of the assets of the plaintiff herein described as made under execution of the judgment of a Court of concurrent jurisdiction standing undisturbed by appeal or otherwise operated to pass the present claim to the sheriff's vendee, and that vendee or his successor in title can alone avail himself of it. A re-

covery here by the plaintiff could not relieve the defendant of the obligation to pay such substituted claimant."

*International Coal Mining Company vs.
Pennsylvania Railroad Company, 38
Legal Intelligencer, page 260.*

The view upon which this State Court acted is, we submit, that which should have controlled the action and decision of the Courts below.

FREDERIC D. McKENNEY
FRANCIS I. GOWEN

For Plaintiff in Error

IN THE
Supreme Court of the United States

October Term, 1911. No. 168

PENNSYLVANIA RAILROAD COMPANY
Plaintiff in Error

vs.

INTERNATIONAL COAL MINING COMPANY
Defendant in Error

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE THIRD CIRCUIT

BRIEF ON BEHALF OF THE PLAINTIFF IN
ERROR

STATEMENT OF THE CASE

The International Coal Mining Company, the defendant in error, a shipper of bituminous coal over the lines of the Pennsylvania Railroad Company, the plaintiff in error, between April 1, 1894, and April 1, 1901, instituted the present action to recover damages because of alleged violations by the Railroad Company of the provisions of the Interstate Commerce Act, the Mining Company's claim being (a) that it had been charged unreasonable rates for the carriage of its shipments, and (b) that it had been subjected to unlawful discrimination because it had been charged higher rates than had certain other shippers, in

respect to whose shipments, it was claimed, the plaintiff in error had rendered a like service under similar circumstances and conditions.

Upon the trial of the case the defendant in error offered no evidence to substantiate its claim that the rates charged for the transportation of its coal had been excessive and consequently unreasonable. The testimony had relation solely to the other branch of the case, viz., the alleged unlawful discrimination to which the defendant in error claimed it had been subjected.

The action was commenced on July 29, 1904, and under the Statute of Limitations of the State of Pennsylvania the right of action as to shipments made more than six years prior thereto was barred. The defendant in error, however, in its Statement of Claim, with the view of overcoming the effect of the statute, had alleged that the plaintiff in error had concealed from it the fact that it was according to other shippers the lower rates of which it complained, but upon the trial of the case it was affirmatively established by the testimony of the secretary and active officer of the defendant in error that he had been fully cognizant of these lower rates throughout the period of the action.

It further appeared that prior to July 29, 1898, the plaintiff in error had carried a large portion of its coal shipments at less than tariff rates, and it was affirmatively shown that all of the defendants in error's shipments in this period had been so carried.

Because of this fact, and also because of the bar of the statute, the trial Judge held that the defendant in error could not maintain the action as to shipments made prior to July 29, 1898, his ruling to this effect being as follows:

"The objection that the plaintiff (defendant in error) is not entitled to prove damages as a result of discrimination on shipments prior to a period of six years before instituting suit is sustained for two reasons. First, from the evidence adduced it shows that both the plaintiff and his competitor were taking a re-

bate, if a rebate at all, from the defendant (plaintiff in error) in violation of law, both illegally accepting an illegal rebate, or a rebate which the defendant from the evidence had no legal right to pay, and second, because from his evidence he shows that he knew that he was being discriminated against in the way he states from his earliest experience in the coal trade, and therefore was not justified, and the Statute of Limitations applies in this case."

(Transcript of Record, page 237.)

It was further affirmatively shown, and indeed became a conceded fact in the case, that as to the shipments made after July 29, 1898, down to and including those made in the month of March, 1899, the defendant in error had been charged the same and as low rates as any other shipper had been charged or had paid. This fact was established by the testimony of Robert M. Rickey, an officer of the Audit Company of New York, who, under the order of the Court, had made an examination of the plaintiff in error's papers and accounts in order to ascertain whether lower rates than the defendant in error had paid had been charged others on shipments to like destinations after July 29, 1898.

The results of the examination made by the Audit Company were embodied in a statement which was put in evidence and which will be found as Exhibit A on pages 379, 380, 381 and 382 of the Transcript of Record. This statement, as will be seen by reference to it, contains, *inter alia*, three columns, one of which shows the tariff rates applicable to the shipments of the defendant in error, another the net rate paid on these shipments, this being the tariff rate less the allowances therefrom (for the system of shipments at less than tariff rates continued down to March 31, 1899), and the third the lowest net rate paid by any competitor of the defendant in error; and in connection with the rates named in this last column Mr. Rickey testified that in making the examination in order to determine the lowest net rates so paid he had examined the accounts of the plaintiff

in error which had to do not only with the shipments of those shippers who had been named in the defendant in error's Statement of Claim as favored in respect to rates, but as well those relative to the shipments of any other shipper designated by the defendant in error. (See Transcript of Record, page 286.)

Any claim, therefore, in respect to the shipments made by the defendant in error between July 29, 1898, and April 1, 1899, was thus eliminated from the case. And not only did the Audit Company's examination show that in this period the defendant in error had secured as low rates as any other shipper, but it further showed that this condition had existed for some months preceding July 29, 1898, and, indeed, throughout the entire period which was covered by the examination. The period so covered commenced April 1, 1898, almost four months prior to July 29, 1898, and in respect to the rates charged the defendant in error, the same conditions were shown to have existed during the months preceding July 29, 1898, as prevailed after that date. This is established by the following testimony of Mr. Rickey:

"Q. Taking the year beginning April 1, 1898, and terminating April 1, 1899, did you find that in any instances any other shipper had been charged a less rate for the carriage of his or its coal to the same destinations than had been charged to the plaintiff?

"A. No, we found no lesser rate in that period that you mention. The period you state was up to and inclusive of March 31, 1899.

"By THE COURT:

"Q. Do I understand you that up to that period the competitors of the plaintiff and the plaintiffs themselves, according to those letters, got the same rate to the same points or similar points?

"A. Yes, sir."

(Transcript of Record, page 286.)

As to shipments transported by the plaintiff in error after March 31, 1899, the evidence established that the tariff rates had been charged on all these, but that the plaintiff in error had subsequently repaid a portion of the charges collected by it from some of its shippers, its reason for doing so being as follows:

It had been the practice of the plaintiff in error on April first of each year to establish and put in force rates on bituminous coal which it was understood would remain stable and unchanged until the following April first, except in the case of some unexpected contingency, and the shippers over the lines of the plaintiff in error as a rule so adjusted their business that deliveries under any contracts which they might enter into covering deliveries for any fixed period of time would be completed within the so-called "coal year," in which they were entered into. This was not, however, the invariable practice, and this was notably so as to contracts for the furnishing of coal to steamships or steamship companies, which were generally known as "bunker" contracts. As to these it appeared from the testimony of Mr. Wilson, Secretary of the defendant in error, that these contracts were frequently not confined to the coal year in which they happened to be made, but often called for deliveries extending over different and longer periods. (See Transcript of Record, page 312.) No question as to the rate of freights to be applied on shipments made under such contracts when these extended over April first in any year had arisen prior to April 1, 1899, because of the fact that there had been no advances of rates which would make it necessary to give consideration to this question. On April 1, 1899, however, a general advance in its coal rates was made by the plaintiff in error, and at the time of this advance some shippers over its lines were under contract to make deliveries of coal running through the new coal year and in some instances through the year 1900, and the price at which the coal had been sold, which was a delivered price at

the point of destination of the shipments, had been based upon the rates of freight in force at the time the contracts were entered into. The plaintiff in error was in no sense a party to these contracts, and so far as the evidence goes did not know of their existence until about the time when the advance in rates was to take effect, but as it was manifest that if the higher rates were applied to shipments made in fulfillment of these contracts loss would be entailed upon the shippers who were parties to them, the plaintiff in error determined to, and did, continue to apply the rates prevailing prior to April 1, 1899, to all shipments of coal made on and subsequent thereto under these unfilled and unexpired contracts.

On April 1, 1900, some additional advances in rates were made, but on shipments made thereafter under contracts entered into prior to April 1, 1899, the plaintiff in error continued to charge the freight rates in force at the time the contracts were entered into.

The separate rates thus charged on contract and non-contract coal were not shown in the plaintiff in error's tariffs. These showed but the one rate. The plaintiff in error, however, advised its shippers of the determination reached in respect to the contract coal, and although the defendant in error in its Statement of Claim alleged that it had no knowledge until a short time prior to the institution of the action of the lower rates charged on the coal shipped under these unexpired contracts, this allegation was shown upon the trial to have been untrue, for Mr. Wilson, the Secretary of the defendant in error, admitted that on or about April 1, 1899, he had been notified by the General Coal Freight Agent of the plaintiff in error, J. G. Searles, of what was proposed to be done, and had been asked whether the defendant in error had outstanding any contracts under which deliveries had still to be made, and had also been expressly informed that it was the intention of the plaintiff in error, if there were such contracts, to apply the lower rates on shipments made thereunder. (See Transcript of Record, pages 312 and

356.) And it was further shown that on May 10, 1900, the defendant in error filed with the plaintiff in error copies of contracts made in the year preceding April 1, 1900, with the view of securing the lower rates prevailing in that year on shipments made thereunder after April 1, 1900. (See Transcript of Record, page 313.)

Shipments of coal in fulfillment of obligations under contracts entered into by other shippers were made during the coal years commencing April 1, 1899, and April 1, 1900, and while the plaintiff in error charged and collected the tariff rates on all these shipments, a refund was subsequently made to the shippers of a sum which represented the difference between the tariff rates in force at the time the shipments were made and those in force at the time the contracts were entered into. These refunds were made in the following manner: At the end of each month in which any coal had been carried by the plaintiff in error for any shipper which represented in part shipments under unfilled contracts the shipper rendered statements of the amount of the tonnage of this character so transported, and upon the verification of the statements the plaintiff in error paid to the shipper a sum which represented the difference between the amount paid by him on such proportion of his tonnage and the amount which would have been payable thereon had the tariff rates been applied to it which had been in force prior to April 1, 1899.

The defendant in error did not undertake to establish what proportion of any other shipper's coal had been included in these monthly readjustments or refunds. It did appear, however, that as to one of the shippers of contract coal, viz., the Berwind White Coal Mining Company, less than one-tenth of its shipments represented coal of this character. On this point Mr. E. J. Berwind, the President of that Company, a witness called by the defendant in error, testified as follows:

"Q. While I do not suppose you can give us the actual tonnage shipped under these overlapping con-

tracts and the tonnage which was not embraced within them in any year, can you give us about what proportion of your tonnage was covered by the overlapping contracts?

"A. Less than 10%. I think considerably less.

"Q. On the balance of your shipments you paid the tariff rate?

"A. We did.

"Q. Without any repayment?

"A. Either direct or indirect."

(Transcript of Record, page 340.)

The plaintiff in error in its case undertook to go into this feature, but was stopped by an objection, which was sustained by the Court. (See Transcript of Record, page 358.)

The shippers shown by the evidence to have received the benefit of adjustments or refunds on account of coal shipped under contracts of the character in question were the Morrisdale Coal Company, the Berwind White Coal Mining Company, the Columbia Coal Mining Company, the Mitchell Coal & Coke Company, the Sterling Coal Company, and W. H. Piper & Company. All of these companies, with the exception of the Columbia Coal Mining Company, were miners as well as shippers of coal, and their mines were located on the lines of the plaintiff in error. (See Transcript of Record, page 302.)

The testimony does not disclose whether the Columbia Company was a miner of coal, and if so, where its mines were located, nor did the testimony show at what point or points its shipments originated, but inasmuch as the Columbia's shipments of coal under unfilled contracts to destinations to which the defendant in error also shipped were confined to Bridgeton, New Jersey, and as the defendant in error shipped but 47 tons to that place, and the Columbia Company's rate was only 5 cents a ton less than the defendant in error was charged, the Columbia Company is really a negligible factor in the situation.

All of the mines of the other Companies which were shown to have shipped under unfilled contracts were located in a district or region referred to in the testimony as the "Clearfield Region." This region or district was one of several established by the plaintiff in error for rate purposes, and uniform or group rates were in force from all mines located in that region or district to the same destinations.

The defendant in error was not itself a miner of coal, but was in the business as a middleman, buying coal at various points and reselling it. The coal which it purchased was bought in part from operators whose mines were located on the lines of the plaintiff in error within what was territorially known as the Clearfield Region, but the larger part of the coal purchased and shipped by it after April 1, 1899, embraced in the present action, was purchased from operators located on another railroad, viz., the Huntingdon & Broad Top Railroad, and the shipments consequently originated on that railroad, and were transported in part over it.

Exhibits "B," "C" and "D," which will be found on pages 383, 384, 385, 386 and 387 of the Transcript of Record, embody schedules of the shipments of the defendant in error. The shipments, the initial points of which are shown therein as "Saxton," are those which originated on the Huntingdon & Broad Top Railroad. (See Transcript of Record, p. 301.)

There were in force through rates from the mines on the Huntingdon & Broad Top Railroad via that railroad and the lines of the plaintiff in error, and these rates were the same as those in force at the time from the mines on the lines of the plaintiff in error located in the Clearfield Region. It was not, however, shown that on any shipments made by any shipper from any point on the Huntingdon & Broad Top Railroad after March 31, 1899, lower than tariff rates had been charged either because the shipments were of contract coal or for any other reason.

It appeared from the testimony of the secretary of the defendant in error that the freights on its shipments had been, to a very large extent, paid by the consignees or purchasers of the coal, but it was stated by this witness that the sale of the coal had been made by the defendant in error upon terms which gave it an interest in the rates paid because whatever freights were paid were deducted by the purchasers from the price at which the coal had been sold. The defendant in error's books were not produced which would have shown the terms and conditions upon which the sales were actually made, and as the only witness who testified on the subject had made contradictory statements under oath as to other features of the case, the plaintiff in error asked the Court to instruct the jury that in determining the credence to be given to the testimony of this witness, they should consider these contradictory statements.

The learned trial Judge, in dealing with this request, stated that if he considered the terms of sale material he would give the instruction requested, but he declined the instruction because, as he put it, "there is no doubt the freight was paid, and there is no dispute here that there was any different amount collected than the schedule rate. It was collected from somebody, and it was either collected from the consignee or the plaintiff, and whichever it was collected from, the plaintiff is the proper party to sue. Mr. Wilson's testimony does not seem to me to be important to the finding of any material fact in this case." (Transcript of Record, p. 372.)

The learned trial Judge instructed the jury that the plaintiff in error was not justified in applying the lower rates on the contract coal not because there was no difference in the circumstances and conditions affecting the carriage of the coal—he declined to rule as to this—but because such lower rates had not been shown on the plaintiff in error's tariffs.

He further charged that in determining what shipments were of a like character and involved a like service on the part of the plaintiff in error, it was to be conclusively presumed that in respect to all shipments which originated in the Clearfield District which were transported to the same destinations, the service rendered by the plaintiff in error was a like service within the meaning of the Interstate Commerce Act, and that consequently, if the jury found that the point on the Huntingdon & Broad Top Railroad from which the defendant in error shipped was locally within what was known as the Clearfield District, the defendant in error was entitled to recover on shipments made from that point as well as on its shipments from points on the line of the plaintiff in error, notwithstanding the fact that it had not been shown that lower rates had been applied on any shipments originating on the Huntingdon & Broad Top Railroad.

He further charged that the defendant in error had been damaged as the result of the lower rates at which contract coal had been transported, and that it was immaterial what proportion of the shipments made by shippers who had shipped contract coal was coal of such a character, as the defendant in error could recover as to all its shipments, although only portions of such other shipper's shipments had been carried at lower rates than had been charged the defendant in error.

In addition to the issues involved in the case to which reference has already been made, the right of the defendant in error to maintain the action was put at issue by a special plea filed and also by an offer of evidence made upon the trial. The plea set forth that subsequent to the institution of the action a judicial sale under a judgment against the defendant in error obtained in a State Court of Pennsylvania—Common Pleas of Philadelphia County—had been made of all of its property and assets, including claims, choses in action and causes in action, whether arising out of contracts, torts or penalties, and that as a con-

sequence the cause of action sought to be asserted by the defendant in error in the present action had passed from it to the purchaser at such sale.

To this plea several replications were filed. In none of these were the facts set up by the plea controverted, but various matters were alleged which were relied upon as sufficient to invalidate or make null and void the sale which had been thus made.

The matters thus relied upon were these :

First.—That the sale was invalid because brought about by what the pleader designated as a combination and conspiracy entered into between the plaintiff in the action in which the sale had been had and the plaintiff in error in the present action, the alleged purpose and object of this combination and conspiracy being the destruction of the defendant in error's claim against the plaintiff in error.

Second.—That the sale was invalid because certain taxes due the Commonwealth of Pennsylvania by the defendant in error had not been paid, the claim being that until these had been paid no effective sale could have been had.

Third.—That the sale was invalidated because of the fact that within a period of four months thereafter a proceeding in bankruptcy against the defendant in error had been instituted, which had eventuated in an adjudication of bankruptcy.

Fourth.—That the sale was invalid because the Act of Pennsylvania under which the proceedings were had did not justify a sale of choses and claims in action.

The plea to which reference has been made will be found at page 23 and the various replications at pages 119, 126 and 129 of the Transcript of Record.

Demurrers to all these replications were filed which the Circuit Court overruled because of the conclusion reached

by it that the sale of the defendant in error's choses and claims in action was null and void because not warranted by any Statute of the State of Pennsylvania. The opinion of the Court overruling the demurrers will be found at page 137 of the Transcript of Record.

The learned Judge in reaching this conclusion did not controvert the fact that a sale had actually been made by the Court of Common Pleas of Philadelphia County of the claims and choses in action of the defendant in error, as averred in the plea, but his conclusion was rested upon the proposition that no authority existed for the making of such a sale.

Upon the trial of the case an exemplification of the Record of the Court of Common Pleas in the case which had eventuated in the sale referred to in the plea was offered in evidence, but was excluded by the learned trial Judge upon the ground that he had already determined that this sale was ineffective to affect the defendant in error's right to the claim embraced in the action.

The Circuit Court of Appeals affirmed the rulings of the trial Court, and disposed of the main issues raised on behalf of the plaintiff in error in the following manner:

It held, although apparently reserving the question whether the plaintiff in error might have classified its coal shipments in such a way as to differentiate in rates as between the contract and non-contract, that under the case as disclosed by the testimony the plaintiff in error was not justified in applying the lower rate on the contract coal.

It further held that the defendant in error was entitled to recover as to the shipments made from points on the Huntingdon & Broad Top Railroad because of the conclusion reached by it that there was evidence from which the jury might have found that that railroad was a part of the plaintiff in error's railroad for all purposes connected with the present case, because the Secretary of the defendant in error had testified that his dealings as to freight on shipments of his company were entirely with the plaintiff

in error, this being sufficient, in the opinion of the Court, to make the railroad of the Huntingdon & Broad Top Company a part of the railroad of the plaintiff in error because of the provision contained in the Interstate Commerce Act that the term "railroad" as used therein should include "all the road in use by any corporation operating a railroad whether owned or operated under a contract, agreement or lease."

It also held that the lower rates on contract coal were of themselves legally injurious to the defendant in error, and that its right to recover as to all its shipments was not affected by the fact that only a portion of the contract shippers' coal had been transported at lower rates. In disposing of the contention to the contrary urged by the plaintiff in error, the Court said:

"Whatever may be argued in support of the equity of such a rule, the simple answer is that Congress made no such rule. The purpose of the Act is clear, viz., to enforce equality of rate for a like service in every case, and the mischief is done when for that service a shipper is charged more than any other shipper is charged for any service rendered or to be rendered in the transportation of passengers or property. So long as it charges a lower rate for any shipment, the law is defeated, although on other shipments it may charge the proper rate."

(Transcript of Record, page 425.)

As to the judicial sale made by the Court of Common Pleas of Philadelphia County, the conclusion reached by the Circuit Court of Appeals was rested not upon the ground that the sale as made was invalid or void for any reason, but upon the ground that even if it had operated to pass to the purchaser the claim embraced in the action, this would not constitute a defence to the action, the Court's view apparently being that inasmuch as the sale did not operate to relieve the plaintiff in error from liability to someone,

it was immaterial whether this someone was the defendant in error or the purchaser at the sale.

"The question," said the Court, "was simply a contest of the plaintiff's, and the defendant had no legal right to interject that question into the trial."

(Transcript of Record, page 426.)

In dealing with this question of the effect of the sale the Court for some reason not apparent in the opinion dealt with the question only as affected by the refusal of the Court below to admit in evidence the exemplification of the record which disclosed the sale thus made. The Court did not consider the plea, but in view of the ground upon which its decision was rested there would seem to be no doubt that the conclusion reached would not have been affected by the averments contained therein.

SPECIFICATIONS OF ERROR

The errors relied upon by the plaintiff in error, and which it desires to urge are those which are referred to in the following assignments of error filed on its behalf:

2. The Circuit Court erred in declining to instruct the jury, as requested by the plaintiff in error in the seventh point presented by it, which point was as follows:

"The plaintiff is not entitled to recover on its shipments made in any one month or period of time because of the fact that during such time the defendant transported at a lower rate than it charged the plaintiff a portion of the shipments of some other shipper. If such lower rate was not justified the amount which the plaintiff is entitled to recover is measured by the difference between the rate per ton which it paid on all its shipments during such period and the rate per ton which the other shipper paid on his or its whole volume of shipments during such period.

"As there is no evidence from which the jury can estimate the rate per ton paid on all their shipments by

the shippers, a portion of whose shipments were carried at lower rates than were charged the plaintiff, there is no basis upon which to estimate the amount which the plaintiff is entitled to recover, and it is only, therefore, entitled to recover nominal damages."

3. The Circuit Court erred in instructing the jury that if they found that the points on the line of the Huntingdon & Broad Top Railroad and Coal Company from which a portion of the plaintiff's shipments had been made were in the same district or region in which the shipments originated which it was claimed had been carried by the defendant at lower and consequently discriminatory rates of freight, and that the defendant had in force at the time of such shipments the same tariff rate from all points in this region to the various destinations to which the shipments were made, the establishment and maintenance of this uniform rate was conclusive evidence against the defendant that a like service was performed by it in respect to the transportation of the plaintiff's and of the other shipments, the instruction to this effect being as follows:

"When a railroad company does take in a district as an initial point from which to ship its goods and schedules that in its tariff rates as an initial point or district from which it is transporting merchandise, it is conclusive evidence against the railroad company that as to all merchandise and property of like kind from that particular district the service is, as to the initial point, a like service under substantially similar circumstances and conditions. That is to say, so far as the starting point is concerned, the services are rendered under similar circumstances and conditions. All the Clearfield district as designated in these tariff schedules, is on the same footing. Any man shipping coal out of the Clearfield district, if he ships to the same destination under similar circumstances, it makes no difference where he loads his coal in the Clearfield district, is receiving only a like service under substantially similar circumstances and conditions."

4. The Circuit Court erred in refusing to instruct the jury, as requested by the plaintiff in error in the fifth point presented by it, which point was as follows:

"The burden is upon the plaintiff to prove that the service rendered by the defendant in the transportation of the coal for other shippers on which it charged a lower rate was a like service to that which it rendered the plaintiff. As to the plaintiff's shipments which originated on the line of the Huntingdon and Broad Top Railroad the service performed by the defendant in transporting these shipments was not a like service to that which it performed in transporting shipments originating on its own lines, and hence the plaintiff cannot recover as to any of its shipments which originated on the Huntingdon and Broad Top Railroad."

5. The Circuit Court erred in declining to instruct the jury as requested by the plaintiff error in the eighth point presented by it, which point was as follows:

"The evidence establishes the fact that the plaintiff itself did not pay the freights a portion of which it now claims a right to recover. Payment of these freights, as the evidence shows, was made by those who purchased the coal from the plaintiff on which the freights were paid.

"In order to entitle the plaintiff to recover it must have established to your satisfaction that under the terms of sale of this coal it, and not the purchasers, would have received the benefit of any reduction in the rate. The only evidence as to the terms of sale is that given by Mr. Wilson. If you are not satisfied to accept it as true, the plaintiff cannot recover. In considering the credit which you should give to Mr. Wilson's testimony on this point, it is due to the defendant that you should take into account the fact, if it be a fact, that the testimony of Mr. Wilson on other points or the statements embodied in the record of this case, which he has sworn to, have been shown to have been either false or inaccurate, and that you should further consider whether any circumstance has been established which fairly excuses the non-produc-

tion by the plaintiff of its books showing the character of the transactions between itself and the purchasers of the coal."

the Court's answer to this point being as follows:

"I do not think that there is anything at issue in this case that depends on the testimony of Mr. Wilson. If I did I would call attention to the fact that Mr. Wilson has sworn to conditions at different times differently. The fact that this coal was shipped by the plaintiff is established. The schedule of the railroad company is not disputed. Mr. Wilson testified, of course, that consignees paid the freight and returned the balance to him. It makes no difference who would get the advantage, the plaintiff is the proper party to sue. There is no doubt the freight was paid, and there is no dispute here that there was any different amount collected than the schedule rate. It was collected from somebody, and it was either collected from the consignee or the plaintiff, and whichever it was collected from, the plaintiff is the proper party to sue. Mr. Wilson's testimony does not seem to me to be of importance, to the finding of any material fact in this case."

7. The Circuit Court erred in declining to instruct the jury as requested by the plaintiff in error in the tenth point presented by it, which point was as follows:

"To entitle the plaintiff to recover anything in excess of nominal damages as to its shipments made after April 1st, 1899, the jury must be satisfied that it sustained some loss or injury, due to the fact that the defendant was carrying at the same time at lower rates coal shipped by other shippers. The plaintiff has not shown that it did sustain any such loss or injury, and it is entitled, therefore, to recover only nominal damages, even if the carriage at such lower rates for other shippers by the defendant was not justified."

8. The Circuit Court erred in declining to instruct the jury as requested by the plaintiff in error in the eleventh point presented by it, which point was as follows:

"Under all the evidence in the case the plaintiff is only entitled to recover nominal damages, and your verdict should accordingly be only for such an amount."

9. The Circuit Court erred in declining to instruct the jury as requested by the plaintiff in error in the twelfth point presented by it, which point was as follows:

"Under all the evidence in the case the plaintiff is not entitled to recover, and your verdict must be for the defendant."

10. The Circuit Court erred in sustaining the objection of the defendant in error to the following question put by counsel for the plaintiff in error to J. G. Searles, the General Coal Freight Agent of the plaintiff in error.

"Q. Were the adjustments which were made with any shipper on account of unfilled contracts made on his or its total tonnage?"

"Objected to as irrelevant. Also because the Railroad Company has the whole evidence on the subject and can prove it in the regular and proper way."

11. The Circuit Court erred in sustaining the objection made by the defendant in error to the admission in evidence of an exemplification of the record of the Court of Common Pleas No. 1 for the County of Philadelphia, in the case of the Cresson and Clearfield Coal & Coke Company vs. International Coal Mining Company, the latter being the plaintiff in the present action, which exemplification was offered in evidence for the purpose of showing that pursuant to an order made by the said Court of Common Pleas No. 1 of the County of Philadelphia, in the case referred to, a sale had been had of the franchise and assets of every character and description, including choses in action and claims in action of the plaintiff Company, and that this sale had been subsequently confirmed by the said Court, the purpose of this offer being to show that whatever claim or right of action, if any, the plaintiff prior to such

sale was in a position to assert against the defendant, had been lost through this sale and had passed to and vested in the purchaser thereat."

12. The Circuit Court erred in declining to enter judgment for the plaintiff in error upon its demurrer to the defendant in error's replication to the special plea filed October 25, 1905, the plaintiff in error having by said plea pleaded the sale of the defendant in error's franchises, and its assets of every description, including claims and choses in action, made by the Court of Common Pleas No. 1 for the County of Philadelphia in a proceeding of which the said Court had jurisdiction, and to which the said defendant in error, the International Coal Mining Company, was a party, having been the defendant therein, to which plea the defendant in error had replied that the proceeding had in the said Court of Common Pleas No. 1 was void and ineffective because the said Court of Common Pleas No. 1 had no authority to sell its claims and choses in action, because the sale had been procured through some alleged fraudulent practices to which it was claimed the plaintiff in error had been a party, and lastly, because the sale had been avoided by an adjudication of bankruptcy made and entered against the International Coal Mining Company within four months after the date of the sale.

13. The Circuit Court of Appeals erred in affirming the judgment entered by the Circuit Court in favor of the plaintiff.

14. The Circuit Court of Appeals erred in not reversing the judgment of the Circuit Court.

ARGUMENT

Before considering the issues involved in the present case which were considered and disposed of by the Circuit Court and the Circuit Court of Appeals, reference should be made to the question of the jurisdiction of the Circuit Court to entertain the action.

At the time the case was tried in that Court and at the time it was heard by the Circuit Court of Appeals the decision of this Court in the case of *Baltimore & Ohio Railroad Company vs. Pitcairn Coal Company*, 215 U. S. 441, had not been rendered, and the full significance of the previous decision in the case of *Texas & Pacific Railway Company vs. Abilene Cotton Oil Company*, 204 U. S. 426, had hardly been appreciated or recognized.

In the light of these decisions the question of jurisdiction would seem to be necessarily involved, and it is difficult to see how the jurisdiction of the Circuit Court to entertain the action can be upheld.

Unless we have misapprehended the effect of these decisions it must now be accepted as the settled construction of the Interstate Commerce Act that exclusive jurisdiction to entertain actions arising thereunder is primarily in the Interstate Commerce Commission in all cases in which, under the powers conferred, that body is authorized to act. Referring to the confusion that would result from any different construction of the Act, this court, speaking by the present Chief Justice, said in the Pitcairn case.

"A particular regulation of a carrier engaged in interstate commerce is assailed in the courts as unjustly preferential and discriminatory. Upon the facts found the complaint is declared to be well founded. The administrative powers of the commission are invoked concerning a regulation of like character upon a similar complaint. The commission finds, from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference would result from the very prevalence of the two methods of procedure. If, on the

contrary, the commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the commission was to prevail, then the function exercised by the court would not have been judicial in character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body."

In the Pitcairn case the question involved was whether a certain practice or regulation of the carrier was unjustly discriminatory, while in the present case the question, of course, is whether certain rates were unjustly discriminatory. It will hardly be contended, however, that this fact prevents the application to the present case of the rule laid down by this Court in the Pitcairn case, for the reasons which led this Court in the Pitcairn case to hold that the Commission's jurisdiction was exclusive in respect to questions involving discrimination in practices apply with equal force when the question involved is whether the Commission and the Courts can both deal primarily with issues, the determination of which depends upon a finding as to the discriminatory or non-discriminatory character of rates which are made the subject of attack by a shipper.

The jurisdiction of the Circuit Court, therefore, in the present case would seem to depend upon the existence or non-existence of jurisdiction in the Interstate Commerce Commission to entertain it.

Could the defendant in error have proceeded before the Commission for the recovery of the damages which it is seeking to recover in the present action? As to this, it would seem that there can be no substantial doubt.

Section 9 of the Interstate Commerce Act provides as follows:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Com-

mission as hereinafter provided for or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

Here is a distinct grant of power to the Commission to entertain complaints for the recovery of damages sustained by a shipper as a result of a violation of any of the provisions of the Act by a common carrier. That the framers of the Act intended that the power thus conferred should extend to the ordinary actions of which the Courts can take cognizance is, we submit, the necessary conclusion from the grant of the alternative right which the section confers to proceed either before the Commission or before the courts, and from the effect which results from an election upon the part of a shipper as to the remedy which he will avail himself of.

That the Commission has been vested with the necessary authority to award damages cannot be successfully disputed in view of the provisions of Section 16, which reads as follows:

"That if after hearing on a complaint, made as provided in Section 13 of this Act, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

It has been suggested, and this Court will doubtless be pressed with the contention, that the power of the Commission to award damages exists only in cases in which these can be awarded in connection with some order condemning

or granting relief from some existing schedule of rates or practice or regulation of a common carrier, and that the power does not extend to cases like the present, in which damages only are sought for past acts of the carrier, and where no relief is asked from any existing rate or schedule.

This contention, however, we submit, cannot be sustained, in view not only of what this Court decided in the Abilene case, but what was said by it in the opinion delivered. In that case an ordinary action at law had been brought by a shipper in a Court of the State of Texas to recover a portion of a rate which the defendant in the action had charged it upon the ground that the rate so charged was an unreasonable one.

There was no other relief sought, but in view of the character of the claim and of the issues which had to be determined by the tribunal that should hear the case, this Court held that the Commission had jurisdiction and exclusive primary jurisdiction, and that consequently the courts were without power to entertain the action.

Clearly, therefore, this Court held in that case that an ordinary action for the recovery of damages resulting from alleged past violations of the provisions of the Act was cognizable by the Commission, and that in reaching this conclusion the contention which we are here dealing with was not overlooked is evident from what was said in the opinion delivered.

"Although an established schedule of rates," said the present Chief Justice, "may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of, and awarding reparation to, individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force." (Page 442.)

"When the Commission is called upon on the complaint of an individual to consider the reasonableness of an established rate its power is invoked not merely to authorize a departure from such rate in favor of the complaint alone, but to exert the authority conferred upon it by the Act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all. And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was in force by the carrier, and before its change and the establishment of a new one. In other words, the difference between the two is that which on the one hand would arise from destroying the uniformity of rates which it was the object of the Statute to secure, and, on the other, from enforcing that equality which the Statute commands." (Page 446.)

So that it is apparent not only from the actual decision reached by this Court, but as well from what was embodied in the opinion which it delivered in the *Abilene* case, that the Commission could have taken jurisdiction of the present action had it been instituted before it, notwithstanding the fact that before its institution the plaintiff in error had discontinued the dual rates complained of.

This Court has in a late case again had occasion to consider the extent of the power vested in the Interstate Commerce Commission in respect to controversies involving alleged violations of the provisions of the Act by common carriers. In the case referred to—*Interstate Commerce Commission vs. Delaware, Lackawanna & Western Railroad Company*, 220 U. S. 235—the question involved had to do with rates and not practices, and this Court was asked to review the conclusion which had been reached by the Commission as to whether consideration could be given to certain facts or circumstances which it was claimed by the carrier in that case should be taken into account in determining whether a dissimilarity of circumstance and condition ex-

isted in respect to certain traffic sufficient to justify a dissimilarity in the carrier's rates and charges.

The Commission had held that the necessary dissimilarity in circumstance and condition had not been shown and this Court declined to review this conclusion because the decision reached by the Commission involved, to quote from the opinion delivered, "conclusions of fact as to which the judgment of the Commission is not susceptible of review by the Courts." So that in that case it was held by this Court that the Commission was vested not merely with primary jurisdiction to determine issues of the character which are necessarily involved in the case now before the Court, but with practically exclusive jurisdiction in so far as the determination of these issues called for or required consideration of the effect which should be given to facts or circumstances claimed to have pertinency or bearing upon the question of dissimilarity of service within the meaning of Section 2 of the Interstate Commerce Act.

In the present case the learned trial Judge neither submitted to the jury the question whether the lower rates on contract than on non-contract coal were justified because of the difference in circumstance and condition relied upon by the plaintiff in error, nor did he determine this even as a question of law, because of the conclusion upon which he acted that the lower rates on the contract coal were illegal because not shown on the tariffs and were necessarily therefore legally injurious to the defendant in error. If the view of the law upon which the learned trial Judge acted was correct, then, of course, it was not incumbent upon the defendant in error to obtain a ruling from the Commission as to the legal propriety of the two rates as a prerequisite to a recovery of damages because of the carriage of the contract coal at the lower rates, but we confidently submit that the learned Judge was in error in holding that the failure of the plaintiff in error to publish these lower rates debarred it from asserting or maintaining that they were not unduly or unjustly discriminatory as against the defendant in error.

We are not concerned in the present case with the question whether the plaintiff in error had in any respect violated or ignored the provisions of the Interstate Commerce Act in carrying traffic at rates not shown on its tariffs; what we are concerned with is whether the lower rates were, as against the defendant in error, unduly preferential, and surely in the determination of this issue it is wholly immaterial whether the lower rates were or were not published rates.

Since the decision in the Pitcairn case, the Circuit Court in which the present action was instituted has, in a case in which a shipper sought to recover damages because of the enforcement by the defendant of an alleged unlawful method of car distribution, declined to entertain the action, notwithstanding the fact that the method complained of had been discontinued prior to its institution, and its ruling has been affirmed by the same Circuit Court of Appeals before which the present action came.

The case referred to is that of the *Morrisdale Coal Company vs. Pennsylvania Railroad Company*, and the decision of the Court of Appeals will be found reported in 183 Fed. Rep. 929.

The failure of the plaintiff in error to raise the question of jurisdiction in the Circuit Court or in the Circuit Court of Appeals is immaterial, in view of the general rule of law that neither failure to object or even express assent can give jurisdiction to the Federal Courts in cases in which it otherwise would not exist.

"The nature of the controversy," said the present Chief Justice in the Pitcairn case, "and the relief which it requires is such that even without the assigned error to which we have referred the question at the very threshold necessarily arises and commands our attention as to whether there was power in the Courts under the circumstances disclosed by the record to grant the relief prayed consistently with the provisions of the Act to regulate commerce."

If, however, this Court should see its way clear to upholding the jurisdiction of the Circuit Court, then we submit that error was committed by the lower Courts in their disposition of the following issues:

1. WERE THE LOWER RATES CHARGED BY THE PLAINTIFF IN ERROR ON CONTRACT COAL LEGALLY INJURIOUS TO THE DEFENDANT IN ERROR?

2. IF THE LOWER RATES ON CONTRACT COAL WERE LEGALLY INJURIOUS TO THE DEFENDANT IN ERROR WAS IT ENTITLED TO RECOVER THE DIFFERENCE BETWEEN THE RATE PAID BY IT AND THE LOWER RATE CHARGED ON CONTRACT COAL, ON ALL ITS SHIPMENTS, NOTWITHSTANDING THE FACT THAT THE SHIPPERS WHO HAD RECEIVED THE BENEFIT OF THE LOWER RATES ON CONTRACT COAL HAD ALSO BEEN SHIPPERS OF NON-CONTRACT COAL ON WHICH THE SAME RATES OF FREIGHT HAD BEEN PAID AS HAS BEEN PAID BY THE DEFENDANT IN ERROR?

3. HAD THE PLAINTIFF IN ERROR RENDERED A LIKE SERVICE IN THE TRANSPORTATION OF A LIKE KIND OF TRAFFIC UNDER SUBSTANTIALLY SIMILAR CIRCUMSTANCES AND CONDITIONS, WITHIN THE MEANING OF SECTION 2 OF THE INTERSTATE COMMERCE ACT, IN THE CARRIAGE OF THE COAL OF THE DEFENDANT IN ERROR WHICH ORIGINATED ON THE LINE OF THE HUNTINGDON & BROAD TOP RAILROAD, TO THAT WHICH IT RENDERED IN THE TRANSPORTATION OF COAL WHICH ORIGINATED ON ITS OWN LINE?

4. WAS THE DEFENDANT IN ERROR ENTITLED TO MAINTAIN THE PRESENT ACTION IN VIEW OF THE JUDICIAL SALE OF THE CLAIM UPON WHICH IT WAS BASED MADE BY THE COURT OF COMMON PLEAS OF THE COUNTY OF PHILADELPHIA?

5. WAS ERROR COMMITTED BY THE TRIAL JUDGE IN HIS INSTRUCTION TO THE JURY THAT IT WAS NOT ESSENTIAL TO THE MAINTENANCE OF THE ACTION THAT THE DEFENDANT IN ERROR SHOULD HAVE PROVED THAT THE

FREIGHT RATES ON THE SHIPMENTS COVERED BY THE ACTION WHICH WERE PAID BY OTHERS THAN ITSELF WERE PAID FOR ITS ACCOUNT?

We have refrained, as will be observed, from asking this Court to review the conclusions reached by the Courts below as to the right of the plaintiff in error, having regard to the obligations imposed upon it by Section 2 of the Interstate Commerce Act, to maintain the different rates on contract and non-contract coal.

We have done this because, unless we have misapprehended the scope and effect of the decision of this Court in the case of *Interstate Commerce Commission vs. Delaware, Lackawanna & Western Railroad Company*, 220 U. S. 235, it has now been determined that this Court has not the power to deal with and pass upon the issues which would necessarily have to be dealt with and passed upon before the lower rates on contract coal could be condemned as unduly or unlawfully discriminatory.

In that case the Interstate Commerce Commission had considered and determined whether different rates were justified for what was claimed to be the same transportation service because of certain facts which the carrier whose rates were involved contended created a difference of circumstance and condition which justified the difference in rates, and when this Court was asked to review the determination reached by the Commission it held that it was without power to do so. It is true that in the present case the Court is asked to deal with issues of a similar character *de novo* and unaffected by any previous decision or determination of the Commission, but it cannot be that because of this consideration the Court is possessed of power which it otherwise could not exercise. If we were to act upon this theory, then this anomalous and, as we conceive, totally inadmissible result might follow, that in the present case this Court might condemn the lower rates as unjustly discriminatory, while in another case, if this had originally

been brought before the Commission, and that body had held that these lower rates were not unjustly discriminatory, this Court would be obliged to follow the decision of the Commission and hold the very rates to be non-discriminatory which it had previously condemned as discriminatory.

The Circuit Court, as we have already had occasion to point out, held that the lower rates on contract coal must be treated and regarded as unlawfully discriminatory because they were not shown on the tariffs of the plaintiff in error. Of course, if this view could be sustained, then the defendant in error is not embarrassed by its failure to secure from the Interstate Commerce Commission an order of condemnation as a necessary prerequisite to the recovery by it of damages. But the view upon which the learned trial Judge acted cannot, we submit, be sustained. If the plaintiff in error was justified in carrying contract coal at lower rates, the fact that it failed to show these rates on its tariff would not give the defendant in error any right to recover if no such right would have existed had the lower rate charged been a tariff rate. In other words, a shipper under the Interstate Commerce Act has no right to recover merely because a carrier charges some other shipper less than its tariff rate, unless, as a result of this, an inequality of charge forbidden by the second section of the Act is thereby brought about.

Nor does the fact that the lower than tariff rate results from the payment of a rebate of itself confer a right of action upon shippers to whom the rebates were not paid, unless as the result of the payment of these rebates an inequality of charge forbidden by the Act results.

Whether a lower rate complained of by a shipper was or was not a tariff rate is immaterial. The fact that it was a tariff rate will not protect the carrier if, in point of fact, the lower rate was not justified, and the fact that it was not a tariff rate will not give rise to a cause of action on behalf of the complaining shipper if, in point of fact, the lower rate was justified.

A substantial issue is involved, we submit, in the determination of the question whether the lower rates on contract coal were unlawfully preferential.

The Circuit Court of Appeals treated the question as concluded by decisions of this Court, but we do not so regard the matter.

In the view of that Court certain decisions of this Court had established that the purpose of Section 2 was "to afford identity of rate for substantial identity of transportation service, and anything that does not aid in determining what is substantial identity of haulage does not aid in the application of the section." (Transcript of Record, page 422.)

In so holding the Court, we conceive, put too narrow and restricted an interpretation upon the decisions of this Court, for if "identity of haulage" is the only and the determining factor, the so-called "Party Rate" case—*Interstate Commerce Commission vs. Baltimore & Ohio Railroad Company*, 145 U. S. 263—and the so-called "Import Rate" case—*Texas & Pacific Railway Company vs. Interstate Commerce Commission*, 162 U. S. 197—would not have been decided in favor of the carriers, for unquestionably there was no feature of dissimilarity in the transportation or haulage service respectively performed by the carriers in those cases. The decisions in those cases were not rested upon the ground that the carrier in the actual transportation of the ten passengers in the Party Rate case and of the import traffic in the Import Rate case performed a transportation or haulage service which was at all different or dissimilar from that which they were called upon to perform in the transportation of the one passenger and of the domestic traffic. There was, of course, a practical identity of service so far as the mere transportation or haulage of the particular items of traffic, the rates on which were at issue, was involved, but this Court held that due to circumstances and conditions which otherwise affected or had to do with the interests of the carrier a dissimilarity of cir-

cumstance and condition existed such as justified a dissimilarity in rates.

Identity of haulage is, of course, a factor, and an important factor, in any case in which identity of service is the point at issue, but it is not the only factor, else this Court could not and would not in the Party Rate case have sustained the right of the carrier to charge two passengers riding in the same passenger train, and perchance in the same seat, between the same points, different rates of fare.

So far as counsel are aware, neither this Court nor the Interstate Commerce Commission have ever laid down a rule which can be regarded as controlling in the present case. In a case which came before the Supreme Court of Pennsylvania a question almost identical with that which is presented in the present case had arisen. The case referred to is that of *Borda vs. Philadelphia & Reading Railway Company*, 141 Pa. St. 484, and in that case, as in the present, the shipper was complaining of lower rates charged by a railroad company for the carriage of coal between the same points of origin and destination, and the railroad company whose rates were involved was seeking to justify these lower rates upon the ground that the coal to which these had been applied had been shipped pursuant to contracts calling for deliveries and shipments of coal extending throughout a year, and its right to charge the lower rates on coal of this character was upheld. It is true that this case was decided with reference to the obligations imposed upon common carriers by the common law, for at the time it arose there was no statute of the State of Pennsylvania enjoining equality of charge by common carriers for like services, but the case is nevertheless an authority, for, as has often been said, the Interstate Commerce Act has but written into the Federal law the common-law obligations resting upon common carriers.

And in a case which arose in Pennsylvania after the enactment of a statute which prohibited discrimination in rates by common carriers the decision in the case above alluded to was quoted with approval as embodying the views which should control and govern the decision of questions arising under the statute. (See *Hoover vs. Pennsylvania Railroad Company*, 156 Pa. St. 222.)

We therefore submit that if this Court should conclude that it could not finally determine the issues in this case in the absence of a determination as to the right of the plaintiff in error to maintain different rates on contract and non-contract coal, then it must necessarily follow that the judgment obtained by the defendant in error cannot stand because it necessarily rests upon the proposition that the lower rates on contract coal were unduly and unlawfully discriminatory, and there has been no determination to this effect by the only tribunal which is empowered to pass upon and determine this question.

But as there are other issues in the case which, if determined in favor of the plaintiff in error must necessarily lead to a reversal of the judgment even if it were an established fact in the case that the lower rate on contract coal was unduly and unlawfully preferential, absence of any determination to this effect by the Commission may not preclude this Court from considering and finally disposing of the case. These issues are involved in the various propositions which we have referred to above, and we shall deal with these in the order in which they have been stated.

1. WERE THE LOWER RATES CHARGED BY THE PLAINTIFF IN ERROR ON CONTRACT COAL LEGALLY INJURIOUS TO THE DEFENDANT IN ERROR?

Section 8 of the Interstate Commerce Act confers and defines the character of the right of action which can be asserted by shippers because of violations by carriers of any provisions of the Act.

That section reads as follows :

"That in case any common carrier subject to the provisions of this Act shall do, cause to be done or permit to be done any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable *to the person or persons injured thereby* for the full amount of *damages sustained* in consequence of any such violation of the provisions of this Act."

The right of action under the Act is limited to the "person or persons injured," and the recovery to the "damages sustained."

In *Parsons vs. Chicago & Northwestern Railway Company*, 167 U. S. 447, the late Mr. Justice BREWER, delivering the opinion of this Court said :

"The only right of recovery given by the Interstate Commerce Act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this Act.' *So before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.*"

It was consequently incumbent upon the defendant in error, as a prerequisite to a recovery in the present action, to establish not merely that the carriage by the plaintiff in error of the contract coal at the lower rates was forbidden by the Interstate Commerce Act, but that it had been injured as the result of such carriage. This burden, we submit, it has wholly failed to discharge. On the contrary, it would seem to be a necessary conclusion from the facts established in the case that no injury did result to the defendant in error from the carriage of the contract coal at the lower rates.

The defendant in error was charged and paid the legal—that is, the tariff—rates, and while in its Statement of Claim the averment was made that the rates so charged and paid were excessive and consequently unreasonable, no effort was made to sustain this averment by proof, and consequently it must be assumed that these rates were reasonable, having regard to the service rendered. It cannot, therefore, be fairly claimed that the defendant in error was injured by the charges made it by the plaintiff in error for the service rendered, and the question, therefore, would seem to resolve itself into this—was it injured because the plaintiff in error carried at lower rates the contract coal of other shippers?

On the assumption that these lower rates were unlawful, then the shippers of the contract coal received unlawful concessions or rebates. It may be conceded that the plaintiff in error violated the Act, upon the assumption upon which we are proceeding, in paying these concessions or rebates, and rendered itself thereby responsible for the penalties imposed by the Act, but the making of unlawful concessions or the payment of unlawful rebates by a carrier does not subject it to actions at the instance of other shippers to whom such concessions or rebates were not paid. In other words, the defendant in error could not have recovered in the present action merely upon proof that the plaintiff in error had paid certain unlawful rebates to shippers of bituminous coal, for, as was well said by the learned trial Judge in the present case in the course of his charge to the jury: "Proof of a rebate granted by a carrier to a shipper, for instance, from Philadelphia to Chicago would not establish a right of recovery of a like rebate on the part of shippers using such carrier's line for shipments from Philadelphia to New York or to any other point than Chicago."

If, then, a rebate to be actionable must not merely be unlawful, but must have been injurious to the shipper complaining of its payment, it was incumbent, we submit, upon

the defendant in error to have established in the present case that the rebates of which it complained were injurious to it. That no injury actually resulted to the defendant in error from the payment of the rebates complained of is evident when it is considered that their payment could not have had the slightest effect upon the volume of sales by the defendant in error or upon the profits realized on the coal which it sold or upon its business generally.

All the coal in respect to which the rebates were paid was absolutely non-competitive. It had already been covered by contracts entered into with other shippers, and the defendant in error consequently would not have been able to sell or ship any portion of it, no matter what rates had been applied to it by the plaintiff in error. So that if we are to treat the adjustments made by the plaintiff in error on this coal as unlawful rebates, the payment of these rebates had no more injurious effect upon the defendant in error than would payments of this character made on account of shipments from the coal regions of Pennsylvania to Chicago have had upon the defendant in error if it had been shipping from these coal regions to New York.

But it may be said that we ought to treat the present case as one in which the defendant in error, while entitled to have its coal transported at the lower rate charged on the contract coal, had been charged the higher rate applicable to non-contract coal, and that consequently it had been injured because it had been obliged to pay a higher rate than it ought to have paid.

But such a contention ignores the assumption upon which we are proceeding and which is really at the foundation of the plaintiff's claim, viz., that the lower rate on contract coal was an unlawful one, for the defendant in error could only have been entitled to have its coal transported at the lower rate provided that rate could lawfully be charged by the plaintiff in error. Such a contention practically amounts to this, that if a carrier pays an unlawful rebate or makes an unlawful concession in rates to a

shipper, it thereby establishes a new rate which becomes applicable to all shipments in the transportation of which the carrier renders a like service to that which it renders in carrying the shipments of the shipper who got the benefit of the rebate or concession.

If such a rule were to be adopted, it would seem necessarily to follow that if the plaintiff in error at any time, under a mistaken view as to its right to do so, should transport free of charge a ton of coal from the Clearfield Region to New York harbor, it would thereby in effect debar itself from making any legal charge for the transportation of any other coal between the same points during the period of time which could be regarded as contemporaneous with that in which the shipment was transported without a charge having been made therefor.

In the instance which we have put, it could not, of course, be fairly contended that the transportation of the one ton had injured all other shippers in respect to all their shipments to the extent of the full amount of freight paid thereon, but if the theory is to be adopted that the movement of any traffic at a lower rate which is found afterwards to have been unjustly discriminatory thereby establishes that lower rate as the legal charge of the carrier, and that all amounts paid in excess thereof must be treated as overcharges, and consequently recoverable, we do not see what other conclusion would be possible than that which we have outlined above.

So far as we are aware, the question we are considering has not heretofore been submitted to or passed upon by this Court.

In *Union Pacific Railroad Company vs. Goodridge*, 149 U. S. 680, this Court affirmed a judgment which had been recovered by a shipper who had been charged and paid higher rates on his shipments than had been charged another shipper, who, it was found, was not entitled to lower rates, and the damages recovered had been measured by the

difference in the rates paid; but this case arose under a statute of the State of Colorado which authorized the recovery in cases of violation of the Act of "the actual damage sustained or *overcharges paid* by the party aggrieved." In that case, therefore, no question could arise such as we have in the present case, and indeed, the right of the plaintiff in the action to have his damages measured by the difference in the rates charged was not questioned.

A similar question to that with which we are concerned was involved in a case which came before the Supreme Court of Pennsylvania to which we have already referred—*Hoover vs. Pennsylvania Railroad Company*.

In that case the Court was required to determine whether the plaintiff in the case before it had established a right to recover, under the Discrimination Act of that State which makes the offending carrier "liable to the party injured for damages treble the amount of the injury suffered," when the proof adduced upon the part of the plaintiff had failed to establish any actual damages resulting from the payment by the plaintiff of a higher rate than another shipper had paid. In that case the trial Judge had charged the jury as follows:

"If the nail works (*i. e.*, the shipper which had secured the lower rate complained of) paid 20 cents less per ton freight on their coal they had that much of an advantage over others, and the law would seem in the mind of the Court to fix that excess as the measure of the plaintiff's damages."

This instruction the Supreme Court characterized as serious error.

"The Act of 1883," said Mr. Justice GREEN, delivering the opinion of the Court, "contains no language justifying an instruction that the party injured could recover three times the amount of the difference in the rates charged. The words of the Act are 'Any violation of this provision shall make the offending

company or common carrier liable to the party injured for damages treble the amount of injury suffered.' The 'amount of injury suffered' is the measure of the single damages to be allowed. But it does not at all follow that the amount of injury suffered is the difference in the rates charged. It might be or it might not be, but in any event it must be a subject of proof, and there was no proof in the case of the actual damage sustained."

The general rule that has been established by the decisions under the English statutes upon which the Interstate Commerce Act has been, to a certain extent, modeled is thus stated by Boyle and Waghorn in their treatise on "The Law Relating to Railway and Canal Traffic," at page 158 of Volume I:

"The words 'preference' and 'advantage' of themselves give rise to questions of considerable importance.

"Applicants occasionally desire to construe these words as the equivalent of benefit and to claim that whatever conveniences or concessions are granted to one trader or class of traffic are due to be granted to all others.

"The Courts do not accept this view. There is no question of preference when different matters are under consideration, and one person is not placed at an advantage over another if their traffic has nothing in common.

"Expressing the point in another form, the Courts read both limbs of the preference section together, and hold that *the preference of the first part must be accompanied with the prejudice of the other, and that the disadvantage of the one must be connected with the advantage of the other before the provisions of the section come into operation.*"

In Manchester, etc., Railway Company vs. Denaby Main Colliery Company, a case which was heard successively by the Queen's Bench Division (Law Reports, 13 Q. B. Div. 674), by the Court of Appeals (Law Reports, 14 Q. B. Div.

209) and by the House of Lords (Law Reports, 11 App. Cases 97), this question, among others, was involved. The Railway Company had instituted an action to recover from the Colliery Company a sum alleged to be due for the carriage of its coals. The Colliery Company set up several counter claims, one of which was based upon an alleged overcharge made it under the following circumstances: It appeared that during the time the Railway Company was transporting the Colliery Company's coals it was also transporting coals for another shipper at rates which were lower, and, as the Court determined, unlawfully lower, than those that it was charging the Colliery Company. The coal thus transported for this other shipper at the lower rate did not comprise all the shipments made by him, and on the balance of his shipments the rate charged was the same as that which the Colliery Company had paid. There was no proof presented upon behalf of the Colliery Company tending to establish that it had sustained any damage due to the carriage at lower rates of the other shipper's coal, although, of course, there was proof that some other shippers had secured the benefit of lower rates on portions of their coal than had been charged it.

All of the Courts which heard the case were of the opinion that the Colliery Company was not entitled to claim *damages* because none such had been shown.

The Court of Appeal held that no recovery could be had either of *damages* or *overcharges*. The House of Lords, however, held that there could be a recovery of overcharges under the so-called "equality clause" (Section 90 of the Act of 1845) of the English Statutes, but did not dissent from the view of the Court of Appeal that recovery could not be upon the ground of damage sustained.

In considering the decision in the case just mentioned, it should be borne in mind that there are two statutes in England intended to secure equality of charge upon the part of carriers. One of these statutes, which embodies the so-called "equality clause" (Section 90 of the Act of 1845),

as construed by the English Courts, makes a higher rate, where a lower one has been unlawfully extended to shippers, extortionate and consequently excessive, with the result that the one paying the higher rate is consequently entitled to recover the difference between the two rates irrespective of actual damage. Referring to the effect of this so-called "equality clause," Mr. Justice BLACKBURN, in the case of *Great Western Railway Company vs. Sutton*, 4 Eng. and Irish Appeal Cases, 226, said:

"If the defendants had charged more to one person than they during the same time charged to others, the charge is by virtue of the Statute extortionate. And I think that the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the Statute by railway companies acting as carriers on their line must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the common law on ordinary carriers as being more than is reasonable."

The decisions of the Interstate Commerce Commission rendered in connection with the administration by that body of the provisions of the Interstate Commerce Act clearly indicate that in its opinion no damages are recoverable from a carrier which has violated the provisions of the Act by charging unequal rates unless the shipper seeking the damages can establish that actual injury resulted to him from such violation.

We shall not encumber this brief with all the decisions of the Commission which have proceeded upon this theory, but will refer to two late ones which are in point.

In *Anaconda Copper Mining Company vs. C. & E. R. R. Co., et al.*, 19 I. C. C. Rep. 592 (1910), it appeared that the complainant, whose works were located in Montana, had been receiving shipments of coke from the West Virginia-Pennsylvania coke field on which a rate of freight had been paid which was made up by combining the rate from the coke ovens to Chicago and the rate from Chicago to the complainant's works.

The rate between the coke ovens and Chicago which was used in this combination was higher than another rate on coke between the ovens and Chicago, the carriers concerned in the rate having in force two rates, one of which, and the lower, was applied to coke shipped for use in blast furnaces, and the other, or higher rate, to coke which was intended for any other use.

The complainant contended that these two different rates were not justified, and that as it had been charged the higher rate, due to the fact that this higher rate had been used in making up the combined rate, it was entitled to recover the difference between the amounts which it had actually paid and the amount which it would have paid had the lower rate between the ovens and Chicago been used in arriving at the combined rate.

The Commission held that the two rates between the coke ovens and Chicago were not lawful, but it nevertheless held that no damages should be awarded because the complainant had not sustained injury which entitled it to reparation. The grounds upon which this conclusion was reached are disclosed by the following extract from the opinion of the Commission:

"This Commission has always held that it is improper for the carriers to base their charges upon the use to which a commodity may be put, and while the statements and arguments presented by the defendants are persuasive, they do not convince the Commission that our position heretofore taken in this regard should be changed.

"The question remains to be determined whether the complainants are entitled to reparation, regardless of whether the \$2.65 rate was or is unjust or unreasonable in and of itself. The complainants contend that it is illegal, unlawful, and contrary to the act for said defendants to charge a different or greater rate for transporting coke based upon its use, and that the \$2.65 rate was unjust, unreasonable, and discriminatory. They offered no evidence, whatever, to show or prove that the \$2.65 rate was in and of itself unjust, unrea-

sonable, or discriminatory save what appeared on the face of the tariffs, and left the unjustness, the unreasonableness, and discrimination to be deduced or inferred as a matter of law. The freight traffic managers of the defendants testified that the \$2.35 rate was a very low rate and that the \$2.65 rate was a just and reasonable rate for the service performed and was not in any manner excessive. The average distance from the ovens to Chicago by the lines of the defendants is about 575 miles and the \$2.65 rate yields an average revenue of 4.6 mills per ton per mile.

"Since July, 1903, the open rate on coke over all lines from the ovens in Pennsylvania and West Virginia to Chicago has been \$2.65 per net ton. This rate has been and is the basing rate from said points of origin to Chicago, and for all territory both east and west thereof and has been paid by all consumers of foundry and other than furnace coke continuously during the past seven years and no complaint has been made against it until these proceedings were instituted for reparation. The lower rate of \$2.35 per net ton for use in blast furnaces for smelting iron from the ores was a tariff reduction, effective not earlier than July 1905, and has been applied only to Chicago and vicinity and is a very low rate for the service performed and in and of itself is not deemed conclusive evidence of the unjustness or unreasonableness of the \$2.65 rate.

"Copper and iron cannot fairly be said to compete with each other in view of the fact that iron sells for less than \$20.00 and copper for anything between \$200. and \$500. per ton. There is no pretense in this case that the complainants were engaged in smelting iron from its ores. The allegation in some of the petitions that the complainants are engaged in smelting ores containing copper, silver, gold, and iron, does not place them under the terms of the tariffs providing for the rate on blast furnace coke, and no effort was made on the part of the complainants to show that they ever actually smelted iron from its ores.

"In view of all the facts and circumstances in these cases we are not convinced that the rate of \$2.65 per net ton charged to complainants was either unjust

or unreasonable for the services rendered by the defendants.

"The complaints will be dismissed."

In *International Salt Company vs. Pennsylvania Railroad Company, et al.*, 20 I. C. C. Rep. 539 (1911), reparation or damages were sought by the complainant under the following circumstances:

The defendants in the proceeding had had in force rates on salt from a salt field in New York to Chicago and to Detroit. In a proceeding instituted by the Delray Salt Company, located at Detroit, the Detroit rate had been held by the Commission to be discriminatory by comparison with the rate to Chicago, and its reduction had been ordered and reparation awarded to the salt company, the complainant in that proceeding.

Thereupon the International Salt Company which had also shipped to Detroit under the rate condemned commenced a proceeding to secure reparation, but this was denied by the Commission upon the ground that the Delray Salt Company had been awarded reparation in the original proceeding because not being a shipper under the Chicago rate it had been injured because of the preferential character thereof and was consequently entitled to recover damages, while the International Company had not been so injured because of the fact that it had been a shipper to Chicago as well as to Detroit, and consequently was not in a position to allege that it had been injured as the result of the preferential rate to the former place.

The Commission's conclusion in the matter was thus expressed:

"As the Delray Company was not doing business at Cuylerville, but at Detroit, it was damaged by the eleven cent rate to Detroit, for it had to use that rate in its competition in the market beyond Detroit reached by this complainant under a ten cent rate to Chicago. We therefore held that the eleven cent rate from Cuylerville to Detroit was discriminatory when compared

with the ten cent rate from Cuylerville to Chicago. But the complainant in this proceeding was the shipper that was shown in that case to be getting the benefit of the ten cent rate to Chicago, and was the competitor complained of by the Delray Salt Company. The particular element of damage there shown is therefore altogether lacking in this proceeding. This complainant was competing in Detroit not with the Delray Salt Company, but with the Cuylerville mines and the mines elsewhere in the same salt field in Western New York, all of which then had and now have the benefit of the same rate to Detroit. It seems reasonably clear, therefore, that the complainant here shipped as much salt to Detroit under the eleven cent rate as it could have shipped under the rate of 7.8 cents if that rate had been in effect from all the competing points in Western New York. The complainant here, never having found any objection to the eleven cent rate to Detroit, demanded of it and all of its rock salt competitors in that salt field, seeks now to come in under Delray Salt Company v. P. R. R. Co., *supra*, and secure the benefit, on its past shipments to Detroit, of our finding in that case. But the two cases are altogether different. In that case, the complainant showed the discrimination or disadvantage to it in competing in the markets beyond Detroit on the eleven cent rate as against the ten cent rate to Chicago. In this case all of the rock salt producers in the salt field in question were reaching and now reach, Detroit on an equal basis. The element of discrimination or of any damage arising out of discrimination is therefore lacking. As was said in *Parsons v. C. & N. W. Ry. Co.*, 167 U. S., 447, at page 460:

"The only right of recovery given by the Interstate Commerce Act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act.' So, before any party can recover under the act he must show not merely the wrong of the carrier but that that wrong has in fact operated to his injury."

As we have already had occasion to point out, the lower rates of which the defendant in error is complaining were

applied to coal which was absolutely non-competitive, for the defendant in error would not have been enabled to ship a pound of it had it been able to ship at the rates applied to this coal, or, indeed, had the conditions been reversed and had it been in a position to ship the coal at lower rates than were available to those who actually made the shipment of it.

The element of damage, therefore, was, we submit, wholly lacking and for this reason the binding instructions which the plaintiff in error asked the trial judge to give in its favor should have been given.

These instructions were covered by the tenth and eleventh points presented by the plaintiff in error, which were, respectively, as follows:

"Point 10. To entitle the plaintiff to recover anything in excess of nominal damages as to its shipments made after April 1, 1899, the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was carrying at the same time at lower rates coal shipped by other shippers. The plaintiff has not shown that it did sustain any such loss or injury, and it is entitled, therefore, to recover only nominal damages, even if the carriage at such lower rates for other shippers by the defendant was not justified."

"Point 11. Under all the evidence in the case the plaintiff is only entitled to recover nominal damages, and your verdict should accordingly be for only such an amount."

2. DEFENDANT IN ERROR NOT ENTITLED TO RECOVER AS TO ALL ITS SHIPMENTS, AS THE EVIDENCE FAILED TO SHOW THAT THE LOWER RATES APPLICABLE TO CONTRACT COAL WERE SECURED BY ANY SHIPPER ON ALL HIS OR ITS SHIPMENTS.

If the conclusion of this Court should be that the defendant in error was "injured" within the meaning of

Section 8 of the Interstate Commerce Act by the carriage of the contract coal at the lower rates, and that the injury is to be measured by the difference between those rates and the rates which it paid, in arriving at the amount of the injury thus sustained all of the shipments made by the defendant in error should not be considered.

Upon the trial the defendant in error did not establish what proportion of any shipper's coal had been carried by the plaintiff in error at the rates applicable to contract coal. It did appear from the cross-examination of one of the plaintiff's witnesses—E. J. Berwind, President of the Berwind-White Coal Mining Company, which, as the evidence disclosed was the largest shipper of contract coal—that probably less than ten per cent. of that Company's shipments represented such coal. Mr. Berwind's testimony on this point was as follows:

"Q. While I do not suppose you can give us the actual tonnage shipped under those overlapping contracts and the tonnage which was embraced within them in any year, can you give us about what proportion of your tonnage was covered by the overlapping contracts?

"A. Less than ten per cent. I think considerably less.

"Q. On the balance of your shipments you paid the tariff rate?

"A. We did.

"Q. Without any repayment?

"A. Either direct or indirect."

(Transcript of Record, pages 340 and 341.)

The defendant, after the close of the plaintiff's case, undertook to go into this feature, and the following question was put to the General Coal Freight Agent of the defendant, J. G. Searles:

"Q. Were the adjustments which were made with any other shipper on account of unfilled contracts made on his or its total tonnage?"

An objection was interposed to this question on behalf of the defendant in error upon the ground *inter alia* that evidence on this point was irrelevant, and this objection was sustained by the trial Judge. (Transcript of Record, page 358.)

Upon the theory that, as a basis for the ascertainment and assessment of damages, it was incumbent upon the defendant in error to have shown the proportion of tonnage shipped at the lower rate by the shippers who it was claimed had received an undue preference in rates, the plaintiff in error submitted the following point or request to charge:

"Point 7. The plaintiff is not entitled to recover on all its shipments made in any one month or period of time because of the fact that during such time the defendant transported at a lower rate than it charged the plaintiff a portion of the shipments of some other shipper. If such lower rate was not justified the amount which the plaintiff is entitled to recover is measured by the difference in the rate per ton which it paid on all its shipments during such period, and the rate per ton which the other shipper paid on his or its whole volume of shipments during such period.

"As there is no evidence from which the jury can estimate the rate per ton paid on all their shipments by the shippers, a portion of whose shipments were carried at lower rates than were charged the plaintiff, there is no basis upon which to estimate the amount which the plaintiff is entitled to recover, and it is only, therefore, entitled to recover nominal damages."

The instruction requested should we submit have been given, if the extent of the defendant in error's damages was to be measured with reference to the proportion of other shippers' shipments carried at the lower rate, and if the burden of establishing this proportion rested upon the defendant in error.

If for any reason this burden had been shifted, then the learned trial Judge was in error in sustaining the objection to the question put to the witness Searles, which was intended to elicit what these proportions had been.

All that the defendant in error can properly claim is that it was entitled to be put on an equality with the most favored of its competitors. Would equality result from the application of the theory upon which the Circuit Court and the Circuit Court of Appeals acted in this case?

Assuming that the defendant in error should succeed in sustaining the judgment of the Court below it will necessarily follow that during the period of the action it will have had all its shipments carried at the lower rate applicable to contract coal, while the Berwind White Company will have had less than 10% of its shipments carried at these rates. That there would be an absolute inequality in this result cannot well be gainsaid.

And in no way that occurs to counsel can the Berwind White Company recover from the plaintiff in error such a sum as would be necessary to put it on an equality with the defendant in error, for, clearly, it could not maintain an action to recover any portion of the tariff rate which it had paid on the ninety or more per cent. of its shipments, because the plaintiff in error had charged it a lower rate on the remainder of its shipments, nor because the defendant in error had recovered from the plaintiff in error damages which it had sustained because of the lower rate at which the ten per cent. or less of the Berwind White Company's shipments had been transported.

The inevitable inequality which would thus result as between the defendant in error and the Berwind White Company with respect to the charges paid by each for the carriage of their respective coals demonstrates of itself, we submit, the unsoundness of the theory upon which the Courts below acted.

Let us suppose that the defendant in error had had contracts outstanding on April 1, 1899, calling for deliveries of coal to be made thereafter, and that it had made shipments of coal under these contracts and had been charged the lower rates applied to contract coal, and that

its shipments of coal of this character had represented the same proportion of its aggregate shipments as had the coal shipped by the Berwind White Coal Mining Company; how, under these circumstances, would it have been possible for the defendant in error to maintain any action? But if the defendant in error would have no right of action had ten per cent. of its shipments been transported at the lower rates, under the conditions assumed does it not inevitably follow that its recovery in the present case cannot extend beyond ten per cent. of its shipments?

So far as we are aware, the question we are considering has not been dealt with or determined by any Court in this country. It was, however, considered by the English Courts in the case already alluded to, that of Manchester, Sheffield and Lincolnshire Railway Company vs. Denaby Main Colliery Company.

In that case the question had to be determined whether the carriage of a portion of one shipper's shipments at lower rates than were charged another shipper entitled the latter to recover as to all its shipments, and the views of the Court of Appeal and of the House of Lords on this subject were as follows:

"It remains only to consider," said LINDLEY, *L. J.*, delivering the opinion of the Court of Appeal, "what damages, if any, the defendants have sustained by reason of the company's reduction of their tolls for the coal carried from the defendant's colliery for Bannister, and shipped at Grimsby for the American steamers. The defendants in fact sent no coals to Grimsby for such shipment, nor did they ever request the Railway Company to carry coals for such shipment. If they had, there is no reason to suppose that they would have been charged more than Bannister. The complaint of the defendant is that the Railway Company prevented it from competing in trade with Bannister; but this is not made out. The Railway Company in no way prevented the defendant from obtaining orders from the Hamburg-American shipping company for South Yorkshire coal. Nor did the Railway Com-

pany prevent the defendant from shipping coals to ports south of Harwich on the same terms as regards tolls as Bannister. The fact, however, remains that at various times the Railway Company did carry coals to Grimsby for the defendant and Bannister under the like circumstances as regards trouble and cost to the Company, and as regards coal got from the defendant's collieries over the same portion of the line; and the Company did charge Bannister for the coals so carried for him less than they charged the defendants; and if the defendants had shown that they had thereby sustained pecuniary loss, they would have been entitled to recover damages in respect thereof. The Divisional Court had held the defendant entitled to recover overcharges made to the defendant on the principle laid down in Evershed's case (1) *i. e.*, the charges made to them in excess of the charges made to Bannister for similar services. But the Court does not say on what quantity of coal, or on how much of the defendant's coal carried to Grimsby this excess is to be calculated, and we are unable to see how the quantity is to be fixed. This difficulty did not arise in Evershed's case (1); and the principle of that case seems to us inapplicable to the assessment of damages in this case. It cannot be right to calculate the amount of overcharge on all the coal sent by the defendants to Grimsby without reference to the quantity on which, or the times during which, a less rate was charged to Bannister, and, as already stated, we do not see on what principle to fix the amount of alleged overcharge. Under the peculiar circumstances of this case, the defendant has not shown any grounds which will justify the Court in holding the Railway Company liable to it for any overcharges or damages."

In the House of Lords, LORD SELBORNE and LORD BLACKBURN, among others, delivered opinions, from which the following are extracts:

LORD SELBORNE:

"I agree with the arbitrator in holding this to be a case of overcharge, and not a question of damages; and I should answer his question (upon the authority

of Sutton's case and Evershed's case, and of the opinion of Lord ST. LEONARDS in Finnie's case) by saying that the proper measure of the overcharge to the appellants is the difference between the amount charged to them, and that charged (after deducting the allowance) to Bannister, for coals carried over the same part of the railway and under the same circumstances, during the same periods of time. Is there, then, any insuperable difficulty arising out of the fact that, during these periods of time, not only the coals on which these allowances were made, but also other coals, on which Bannister was charged the same rates with the appellants, were carried over the same distance, and under the circumstances? I do not think so. *It being known how much coal was actually carried at the reduced rate for Bannister during these periods, it seems to me to result from the principle established in the cases of Sutton and Evershed, that the appellants ought to have been charged at the same reduced rate up to, but not beyond, the same total quantity during the same period of time, and that this is the true measure of the overcharge, for which the arbitrator ought to give them credit."*

LORD BLACKBURN :

"I think that it can not be right to calculate the amount of overcharge on all the coal sent by the defendants from their colliery to Grimsby for shipment without reference to the quantity of coal on which, or the times during which, the less rate was charged to Bannister, or coal carried from the defendant's colliery."

It will be observed that both LORD SELBORNE and LORD BLACKBURN were of the opinion that the amount of the overcharges paid by the Colliery Company was to be ascertained with reference to the volume of Bannister's shipments which had been carried at the lower rate.

But, we submit, the application of such a rule will not work out equitable results, nor tend to secure an equality of charge.

Take the case of two shippers, one of whom in a given month had shipped 1000 tons of contract coal, while the other had shipped 10,000 tons of non-contract coal. Under the theory propounded in the opinions delivered in the House of Lords, the shipper of the 10,000 tons could recover overcharges on only 1000 tons thereof, with the result that he would have had but one-tenth of his shipments carried at the lower rate, while the other would have had the benefit of the lower rate as to all his shipments.

Of course, the conclusions enunciated in the opinions to which we have referred were expressed in connection with a claim for *overcharge* and not for *damage*, because the House of Lords had determined that the case before it was not one in which damages, as such, were recoverable, and consequently some justification existed for measuring the shipments on which the overcharge had been exacted by the volume of the shipments which had been carried for some other shipper at a lower rate.

But even in a case of overcharge, we submit that the fairer and more equitable rule is to determine the amount of the overcharge or of the damages, if the case is one in which damages are recoverable, with reference to the service as a whole performed by the carrier whose charges are under consideration.

Take the case which would be presented if it had appeared in the present case that the Berwind White Coal Mining Company had shipped in one month 10,000 tons under a tariff rate of \$1 per ton, 1000 tons of which was contract coal. It paid the tariff rate on the 10,000 tons, or \$10,000, and if the rate on contract coal had been 25 cents per ton less than on non-contract coal, it got back at the end of the month \$250, and the net result, therefore, was that it had secured the transportation of 10,000 tons at a cost of \$10,000 less \$250, or \$9750, equal on an average to 97½ cents per ton.

Now, if in the same month the defendant in error had shipped 1000 tons at the same tariff rate, all of which was

non-contract coal, it got back nothing at the end of the month, and consequently the amount which it paid for the transportation of its coal in that month was \$1 per ton, or $2\frac{1}{2}$ cents per ton more than was paid by the Berwind White Company, and it is put on an absolute equality with the Berwind White Company if it gets back or recovers a sum which is measured by $2\frac{1}{2}$ cents per ton on each ton which it shipped.

But if the theory is to be adopted which was accepted and acted upon by the Courts below in the present case, what is the result? The defendant in error, by the recovery of 25 cents per ton on all its shipments, recovers \$250 on account of the 1,000 tons shipped in the month, with the ultimate result that it has paid for the transportation of these 1,000 tons an average of 75 cents per ton, as compared with the Berwind White Company's payment of $97\frac{1}{2}$ cents per ton.

The only fair rule to apply, we submit, if exact equality of charge and treatment is the object sought, is to treat the services between which comparison is being made as entireties, and not, in ascertaining the rates paid by the shippers of contract coal, to eliminate consideration of their shipments on which they paid the same rate as the shippers of non-contract coal.

Suppose the case of two shippers, A and B, each of whom had shipped 10,000 tons in a given month, and that the circumstances and conditions required that the same rate should have been applied to all these shipments. The carrier, however, had carried 5,000 tons of A's shipments at a lower rate and the remaining 5,000 tons at a higher rate than was charged on B's shipments, but the average charge on all of A's shipments had been the same as the amount charged on B's shipments. There would have been an absolute equality of charge as to the entire volume of shipments, but notwithstanding this, if the theory of the Courts below be correct, B could segregate the shipments of A carried at the lower rate and could recover a sum which

would result in securing the carriage for him of all his shipments at the lower rate at which A had had half of his shipments carried. And A could also recover in respect to his 5,000 tons which were carried at higher rates than those charged on B's shipments?

But if, in the case supposed, the actions could be brought by A and B, this incongruity would necessarily seem to result, viz., that B would have recovered upon the theory that the lower rate which had been charged A on a portion of his shipments was the proper rate that should have been charged for the service rendered, while in A's action the recovery would be upon the ground that the proper rate to be charged was that which B had paid, notwithstanding the fact that in the action brought by B himself this had necessarily been found to have been excessive.

Suppose that all that had been shown in the present case was that the Berwind White Coal Mining Company, we will say, had shipped 10,000 tons and had paid the tariff rate thereon, and at the end of the month had received from the plaintiff in error \$250. which was found to have been an unlawful concession. Could the defendant in error recover the same amount except upon proof that in that month it had also shipped 10,000 tons and had paid the tariff rate thereon?

Would the case be at all different in principle if in connection with proof of the payment of the concession of \$250. to the Berwind White Coal Mining Company it had been shown that this concession was intended to apply to any particular number of tons comprised in the 10,000 shipped?

3. SERVICE RENDERED BY PLAINTIFF IN ERROR IN TRANSPORTATION OF COAL ORIGINATING ON HUNTINGDON & BROAD TOP RAILROAD NOT A LIKE SERVICE TO THAT WHICH IT RENDERED IN TRANSPORTING COAL WHICH ORIGINATED ON ITS OWN LINES.

Section 2 of the Interstate Commerce Act was intended, to quote again from Mr. Justice BREWER's language in the case of *Wight vs. United States*, "to enforce equality between shippers, and it prohibits any rebate or other device by which the shippers *shipping over the same line the same distance under the same circumstances of carriage* are compelled to pay different prices therefor."

"That section of our Act," said Mr. Commissioner PROUTY, delivering the opinion of the Interstate Commerce Commission in *Cattle Raisers Association vs. Fort Worth & Denver Railway Company*, 7 I. C. C. Rep. 513, "corresponds to what is known as 'the Equality Clause' in the English Act. That clause which was enacted before the 'Undue Preference clause,' corresponding to our third section, provided, in substance, that railroads should exact the same compensation for the same service from all persons. The intent of our Second Section is to prevent discrimination between individuals. It prohibits the rendering of a given service to one person for a less compensation than is exacted from some other person for the same service under substantially similar circumstances and conditions. There can be no violation of that Section unless the services are 'like.' *And in order to be 'like' within the meaning of that section, they must be rendered at least over the same line.*"

The evidence in the present case establishes that the plaintiff in error had for purposes of rate making divided the coal territory tributary to its line into several districts or regions. One of these was known, and is referred to in the testimony, as the "Clearfield Region," and it was from mines in that region which were located directly on the line of the plaintiff in error that all the contract coal referred to in the evidence was shipped. (See Transcript of Record, page 302.)

A portion of the shipments of the defendant in error had been made from mines in this region also located on the line of the plaintiff in error, but a portion thereof, and

the larger portion, had been shipped from mines located on the Huntingdon & Broad Top Railroad.

There were in effect joint through rates over the Huntingdon & Broad Top Railroad and the lines of the plaintiff in error, and under the tariffs in force throughout the period of the action the rates under which the defendant in error's coal was transported which originated on the Huntingdon & Broad Top Railroad were the same as the rates from the mines in the Clearfield Region on the railroad of the plaintiff in error. In other words, the Clearfield Region rates were applied to the mines on the Huntingdon & Broad Top Railroad from which the defendant in error's shipments were made.

It was contended by the defendant in error that because the Clearfield Region rates were also in force from mines on the Huntingdon & Broad Top Railroad, and because the district tributary to that railroad was embraced within what was locally or territorially known as the Clearfield Region, it was to be presumed that the services rendered by the plaintiff in error in the transportation to similar destinations of coal shipments from mines on the Huntingdon & Broad Top Railroad was a like service rendered under similar circumstances and conditions to that that which it rendered in the transportation of coal from mines on its own road, and the learned trial Judge—erroneously, we submit—so instructed the jury, and he refused to charge in respect to the shipments originating on the Huntingdon & Broad Top Railroad as requested in the plaintiff in error's fifth point, which was as follows:

"Point 5. The burden is upon the plaintiff to prove that the service rendered by the defendant in the transportation of the coal for other shippers on which it charged a lower rate was a like service to that which it rendered the plaintiff. As to the plaintiff's shipments which originated on the line of the Huntingdon & Broad Top Railroad the service performed by the defendant in transporting these shipments was not a like service to that which it performed

in transporting shipments originating on its own lines, and hence the plaintiff cannot recover as to any of its shipments which originated on the Huntingdon & Broad Top Railroad."

It was not denied that the Huntingdon & Broad Top Railroad was a separate and distinct organization. On this point the Secretary of the defendant in error testified as follows:

"Q You know, as a matter of fact, that the Huntingdon & Broad Top Railroad is a separate organization operated by its own officers, do you not?"

"A. I have always thought so.

"Q. Don't you know, as a matter of fact, that it is?"

"A. Yes."

(Transcript of Record, page 316.)

To this last answer, however, the witness added the following:

"But we did not know it in the freight rates. We did not ask them for freight rates; we never obtained any freight rates from them. There was no difference in getting a freight rate on Broad Top shipments from a Sonman or Clearfield County shipment."

And he had previously, with reference to the freight rates, testified as follows:

"Q. Taking up the matter of the Huntingdon & Broad Top, they were in the Clearfield Region?"

"A. Yes, under the tariff rates.

"Q. And your dealing as to freight was entirely with the Pennsylvania Railroad,—that is to say, the Pennsylvania Railroad fixed a rate which covered the movement on the Huntingdon & Broad Top?"

"A. Yes."

(Transcript of Record, page 313.)

The fact, if it was a fact, that the Huntingdon & Broad Top Railroad Company permitted the plaintiff in error to

establish and quote through rates from points on its line, and the further fact that it was the practice of the officers of the defendant in error, to obtain freight rates from the plaintiff in error and not from the Huntingdon & Broad Top Railroad Company, does not tend to establish in the remotest degree a similarity of service as between the transportation from mines on the Huntingdon & Broad Top Railroad and that from mines on the line of the plaintiff in error.

The plaintiff in error may have had everything to do with fixing and promulgating the rates, and yet this did not and could not alter or affect the fact that in the case of the shipments over the lines of the two companies, the service was a joint service over a line made up of their two railroads, while in the case of the other shipments, the service was a local service of the plaintiff in error, and the transportation was over its line alone.

If the services in the two cases were like services rendered under substantially similar circumstances and conditions, it would necessarily follow that different tariff rates could not have been legally applied to the shipments which originated on the Huntingdon & Broad Top Railroad from those which originated on the lines of the plaintiff in error, and yet it is, we submit, indisputable—the decisions of the Courts and of the Interstate Commerce Commission are uniformly to this effect—that varying tariff rates could be applied in the case put without violation of the provisions of the Interstate Commerce Act.

In the case of *Railway Company vs. Osborne*, 52 Fed. Rep. 912, the late Mr. Justice BREWER, delivering the opinion of the Circuit Court of Appeals for the Southern District of Iowa, said:

“Where two companies owning connecting lines of railroad unite in a joint through tariff, they form for the connected roads practically a new and independent line. Neither company is bound to adjust its own local tariff to suit the other, nor compellable to

make a joint tariff with it. * * * What we mean to decide is that the through tariff on a joint line is not the standard by which the separate tariff of either company is to be measured or condemned."

· In *Tozer vs. United States*, 52 Fed. Rep. 917, the same learned Justice, delivering the opinion of the Circuit Court of Appeals for the Eastern District of Missouri, said, after referring to the decision in the Osborne case:

"It was there held that each company established its own tariff and that the reasonableness of the tariff of one is not determined by that of any other. It was also held that two connecting companies forming by agreement a joint through tariff create thereby, as it were, a line new and independent of that of either of the connecting companies, and hence that such joint tariff, or the share which either takes of such tariff, is not the basis by which the reasonableness of its local tariff is to be determined. It is true that in that case the question arose under Section 4, with reference to long and short hauls, while in this it arises under Section 3, prohibiting undue and unreasonable preferences or advantages; but still the questions there decided are controlling here. If the joint through tariff of two connecting roads is not a standard by which the local tariff of either can be declared in violation of Section 4, neither can it be the standard by which the question of undue preferences is determined under Section 3."

And in the case of *Parsons vs. Chicago & Northwestern Railway Company*, 63 Fed. Rep. 903, Judge THAYER, delivering the opinion of the Circuit Court of Appeals for the Eighth Circuit, thus summarized the result of the authorities, especially the decisions in the cases last alluded to:

"It was held in both of the cases last cited that a question of undue discrimination must be determined by other considerations than the mere disparity that may exist between a local rate and a joint through rate, and that it never follows, as a matter of law, that an undue preference has been given to a person or locality

because a disparity is shown to exist between a local rate and a joint rate."

As it would, therefore, have been entirely unobjectionable for the plaintiff in error to have had in force tariff rates on its own lines lower than from the mines on the Huntingdon & Broad Top Railroad to the same destinations, no right of action can be maintained because of the carriage by the plaintiff in error of the contract coal from the mines on its own line at rates lower than were paid by shippers whose coal originated on the Huntingdon & Broad Top Railroad.

The learned trial Judge gave undue weight to the similarity in the tariff rates. Even if the mines on the line of the plaintiff in error and those on the line of the Huntingdon & Broad Top Railroad could be regarded as having been grouped for rate making purposes, this fact of itself would not have the effect of establishing that the services rendered in the transportation from these mines were like within the meaning of the Interstate Commerce Act, even if we were to ignore the dissimilarity resulting from the consideration we have been considering.

In the case of *Detroit etc. Railway Company vs. Interstate Commerce Commission*, 74 Fed. Rep. 803, the Circuit Court of Appeals for the Sixth Circuit was required to determine whether the establishment of a group rate by the railway company in that case justified the presumption that the services rendered in connection with the transportation of traffic to and from the points so grouped were to be regarded as "like" within the meaning of the Interstate Commerce Act, and the conclusion reached by the Court was thus expressed:

"Grand Rapids and Ionia have been thus grouped, and the decision in the court below and before the commission treated this grouping as a conclusive admission by the railroad company that the transportation from station to station is under substantially similar circum-

stances and conditions; and because of that admission it necessarily follows that if the rate at Grand Rapids includes a charge for cartage which is not furnished at Ionia as well, the cost of that service being deducted, this section is violated. The grouping which was allowed does not, we conceive, result in such a formidable estoppel as that suggested. It is a question of fact—always a question of fact—whether the circumstances and conditions are substantially similar or dissimilar * * *.”

The decisions of the Interstate Commerce Commission clearly recognize the principle that a rate for a through haul over two connecting roads may and indeed is expected to be higher than the rate between the same points over but one road; in other words, that the transportation in the two cases is not a “like service”, nor performed under substantially similar circumstances and conditions. There have been many decisions to this effect. We shall here refer to but two in one of which the facts were closely analogous if not entirely similar to those of the present case.

In *Loup Colliery Co. vs. Virginian Ry. Co. et. al.*, 12 I. C. C. 471., an application was made, supported by one of the defendants, the Virginian Railway, for the establishment of joint through rates over that railway and the Chesapeake & Ohio Railroad between Page, West Virginia, a point on the Virginian Railway nine miles from its junction with the Chesapeake & Ohio Railroad, and points outside of West Virginia, which should be the same as those in effect from points on the main line and branches of the Chesapeake & Ohio Railroad in the same coal district.

The complaint was dismissed and in the course of its opinion, the Commission said, at page 477:

“It is claimed that the result here sought is necessary to put the operators on each of these roads in this district on a parity, the withholding of which under existing conditions would be unjust discrimination. However desirable it might be in some respects for the coal operators in an entire district to have the

same rates from all points, particularly where they are not separated by great distances, we do not understand that the prohibitions of the statute against unjust discriminations in connection with the provisions for the establishment of through routes and joint rates were intended to force separate and independent carriers in such a district to make the same rates from points on their respective lines, ignoring inequalities in other respects. Such a ruling would in many cases, as in this, totally disregard the long-established practice, recognized as reasonable and just by legislatures, railway commissions, and courts, as well as carriers, of allowing two or more roads making up a through line to charge somewhat more for the through transportation, the earnings on which must be divided among all, than would be deemed reasonable and sufficient for the transportation if performed wholly by a single road."

The same general principle was again enunciated by the Commission in the case of *Cedar Rapids, etc. Ry. Co. vs. C. & N. W. Ry. Co.*, 13 I. C. C., 250 (1908), where at page 255 the Commission said:

"Nevertheless some recognition must be given to the well-established rule that joint rates over two or more connecting lines may and ought ordinarily to be higher than the rate on one-line movements."

It follows, therefore, we submit, that the fifth point of the plaintiff in error should have been affirmed, not refused.

The Circuit Court of Appeals, while it affirmed the rulings of the trial Judge in respect to the similarity of service rendered by the plaintiff in error in respect to shipments originating on its own line and those originating on the line of the Huntingdon & Broad Top Railroad, rested its conclusion not upon the view or theory adopted by the trial Judge, but upon the theory that under the evidence in the case the railroad of the Huntingdon & Broad Top Railroad Company was to be regarded as part of the rail-

road of the plaintiff in error for the purposes of the present case because of the provision embodied in the first section of the Interstate Commerce Act that the term "railroad" as used in the Act should include "all the road in use by any corporation operating a railroad whether owned or operated under a contract, agreement or lease."

The Court will observe that in order to bring the present case within the purview of this provision of the Interstate Commerce Act it must have been made to appear that the railroad of the Huntingdon & Broad Top Railroad Company was either "owned or operated" by the plaintiff in error.

There was no evidence tending to show ownership, and as to operation, the only evidence on the subject was that the Huntingdon & Broad Top Railroad Company was a separate organization, and its operations were conducted by its own officers.

The Court of Appeals in the opinion delivered by it referred to the testimony which it considered had a bearing upon the question, which was that which we have already quoted, and which amounted, we submit, to nothing more than this, that it had been the invariable habit of the officers of the defendant in error to obtain freight rates for its shipments from the plaintiff in error, and that the practice of the plaintiff in error in naming rates on coal originating on the Huntingdon & Broad Top Railroad in no sense differed from that which prevailed in respect to rates on coal which originated on its own lines. Even if the evidence upon which the Court of Appeals relied had a tendency to establish ownership or operation of the Huntingdon & Broad Top Railroad by the plaintiff in error, the question as to the existence of such ownership or operation would at least have been one for the jury. Indeed, the Circuit Court of Appeals seems to recognize this, because it says in its opinion, referring to the facts which the evidence in its opinion tended to establish, "by such acts *the jury had a right to infer* that the Broad Top Railroad

was, so far as the purposes of this case went, and for freight purposes, a part of the Pennsylvania Railroad system."

But the Court overlooked the fact that the question whether the Broad Top Railroad, as it styled it, was a part of the system of the plaintiff in error, had not been submitted to the jury. The proposition which the Court of Appeals relied upon was not presented to or urged upon the trial Judge. The question of fact that he submitted to the jury in connection with the Huntingdon & Broad Top shipments had reference solely to the question whether the point on the Huntingdon & Broad Top Railroad at which the defendant in error's shipments originated was or was not within the Clearfield District.

"You will say", said the learned Judge in his charge to the jury, "whether the evidence shows it (*i. e.*, point of shipment) is in the district or is not in the district. If it is in the district the shipments from that point would be from the same initial point. If it is not in the district, they would not be from the same initial point. It is a matter for you."

But we submit that it would have been error even to have submitted the question to the jury upon the evidence which had been adduced in the case. The fact that the plaintiff in error was a party to the rates under which the coal moved which originated on the Huntingdon & Broad Top Railroad, furnished to the officers of the defendant in error all information required by them as to these rates, and that all the dealings of these officers had been with the officers of the plaintiff in error in all matters affecting rates fell far short of establishing that the plaintiff in error was operating the Huntingdon & Broad Top Railroad.

This Court is familiar with the system in vogue all over the country under which railroad companies join in establishing through rates over their lines. The fact that such rates are entered into, however, of course does not tend in the remotest degree to establish that either one of

the companies parties thereto is engaged in operating the railroad of the other. On the contrary, the existence of the joint rates is really evidence to the contrary. The fact, therefore, that one of the companies parties to such a through rate undertakes to name rates to inquiring shippers is of no possible significance as tending to establish anything more than the fact that that company is itself a party to such a rate.

If, in the present case, the fact that the plaintiff in error named rates under which coal originating on the Huntingdon & Broad Top Railroad was shipped is of the least importance in determining the question whether it was operating the Huntingdon & Broad Top Railroad, then it would seem necessarily to follow that if it had happened that the dealings of the officers of the defendant in error had been exclusively with the Huntingdon & Broad Top Railroad Company in respect to rate matters, that circumstance would have been evidence to establish the fact that that company was operating the railroad of the plaintiff in error. If the plaintiff in error had actually been operating the Huntingdon & Broad Top Railroad during the period of the action, it would have been the easiest thing in the world for the defendant in error to have submitted proof to this effect. It did not undertake to do this, and, as a matter of fact, did not even contend that under the proof which it had offered such a finding was permissible, and the view upon which the Circuit Court of Appeals acted was really of its own motion and not as the result of any insistence on behalf of the defendant in error.

Even if it had been possible to adduce proof which would have required the submission to the jury of the question whether the plaintiff in error had been operating the Huntingdon & Broad Top Railroad throughout the period of the action, the question would of course still have remained whether the plaintiff in error in transporting from points on that road was rendering a like service to that which it rendered in transporting from points on its own

lines, and as it was undisputed that the service rendered was not the same service in fact, and as the only ground upon which it could be claimed that it was like in law was that upon which the learned trial Judge acted, viz., because the rates were the same it necessarily followed that the service must be regarded as the same, the view of the effect of the evidence upon which the Circuit Court of Appeals acted did not justify the affirmance of the judgment obtained by the defendant in error in the Circuit Court in so far as it included the shipments which originated on the Huntingdon & Broad Top Railroad.

Even if it were inferable from the evidence that the plaintiff in error would have carried shipments of contract coal originating on the Huntingdon & Broad Top Railroad at the lower rates which were actually applied to shipments of this coal which originated on its own lines, the right of the defendant in error to recover as to its shipments from points on the Huntingdon & Broad Top Railroad would not be thereby established.

Drinker on the Interstate Commerce Act (1909), section 124:

"In order to constitute a violation of the prohibition of Section 2 against different charges to different persons, it must appear that one individual has actually received some transportation service at a less charge than another, and such is not the case where it merely appears that a less rate was offered to others, no shipment having been made at the reduced rate."

Judson on Interstate Commerce (1905), section 245:

"The discriminating rate must be actually charged to make an offense or cause of action under the act. Merely making or offering an illegal rate when it is not shown that an actual shipment was made, constitutes no legal injury to a shipper who was charged a higher rate. *Lehigh Valley R. Co. vs. Rainey*, 112 Fed. Rep. 487, E. Dist. of Penn."

To the same effect are:

Beale & Wyman, Railroad Rate Regulation (1906), section 943.

Nelson on the Interstate Commerce Commission (1908), page 70.

Barnes on Interstate Transportation (1910), section 428, paragraph D.

The view embodied in the extracts above referred to is that upon which the Interstate Commerce Commission acts. See *Griffie vs. Railroad*, 2 I. C. C. R. 301, and *Missouri, etc., Association vs. M. K. & T. Ry.*, 12 I. C. C. R. 483.

In the latter case the Commission held that even a rate formally established and promulgated, under which, however, no shipments had been moved, could not be treated as a violation of the long and short haul clause of the Interstate Commerce Act, although a higher rate had been applied to the shipments of the complainant which had moved over a shorter and included distance.

A like rule was followed by the English courts. In *Taylor vs. Metropolitan Railway Company*, Law Reports 2 King's Bench Division 55, a shipper who had been charged a certain rate on coke breeze sought to recover on the ground of inequality of charges because a lower rate on the same commodity when shipped for fuel purposes could be secured. There was no evidence that shipments had been actually carried by the railway company at the lower rates, and because of this fact it was held that the plaintiff was not entitled to recover.

"It seems to me," said Mr. Justice KENNEDY, delivering the opinion of the Court, "that there was no evidence given at the trial to establish the inequality of charges of which the plaintiff complains. In my view it is not sufficient to show that the railway company had in their books a rate, which they call 'the rate in force,' in the sense that it was the charge that

they were prepared to make for the carriage between these two stations of coke breeze used for fuel. It lay upon the plaintiff to show that goods of that description had in fact been carried for some customer at the lower rate during the period of the payments now sought to be recovered back. And of that the mere existence of such a rate in the company's rate-book is, in my opinion, no evidence."

4. EFFECT OF SALE MADE BY COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY OF CHOSSES AND CLAIMS IN ACTION OF THE DEFENDANT IN ERROR.

That the Court of Common Pleas of Philadelphia County did, as a matter of fact, direct the sale, *inter alia*, of all "claims, choses in action and causes in action arising out of contracts, torts or penalties" of the defendant in error, and that pursuant to such order such a sale was had, cannot be successfully denied.

The order or decree directing the sale will be found at page 168 of the Transcript of Record, and immediately following this order will be found a copy of a petition of the defendant in error, addressed to the Court which had directed the sale, setting out that the only asset which the petitioner possessed was the claim against the plaintiff in error which is the subject matter of the present action, that such claim would be sacrificed if sold in the manner proposed, and praying that for reasons disclosed in the petition the sale be stayed.

This petition was denied by the Court, as appears from the order which will be found at page 170 of the Transcript of Record, and the return made by the Sheriff showing the sale of all of the property of the defendant in error, including its "claims, choses in action and causes in action arising out of contracts, torts or penalties" will be found at page 171 of the Transcript of Record.

It is clear, therefore, that a sale of the claim embraced in this action was made, and our contention was and is that the Circuit Court was required to give effect to this sale, and was not at liberty to ignore or disregard it.

The defendant in error, by its replications to the plea which had set up this sale as a bar to the prosecution of the action, set forth various matters which it averred justified the Circuit Court in disregarding or ignoring the sale. In the first place, it was averred that the sale was brought about through and by means of an alleged fraudulent combination or conspiracy between the plaintiff in error in this case and the plaintiff in the action in which the sale was had, but clearly this averment raised no issue which the Circuit Court below could take cognizance of. If, in point of fact, the sale had been the result of a combination or conspiracy which, if established, would have invalidated it, the only tribunal which could grant relief would be the Court which had been imposed upon or deceived and which had been thus induced to make the order of sale.

And the same criticism may be made as to the allegation made in the replications respecting the existence of unpaid State taxes. If the existence of these taxes did operate to invalidate the sale, relief could only be secured through the Court which had made it.

Another fact set up in the replications as a ground for invalidating the sale was the order adjudicating the defendant in error a bankrupt made within four months after the sale, this contention being rested upon the provision of the bankruptcy law which provides "that all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same and shall pass to the Trustee as a part of the estate of the bankrupt, unless, etc."

It will be observed that the annulment thus provided for does not extend to sales under or pursuant to judgments, and *In re Bailey*, 144 Fed. Rep. 214, it was held by the

District Court for the District of Oregon, that this section did not apply to a case where a Sheriff had sold property under an execution and had delivered it to the purchaser before the institution of the bankruptcy proceedings, and in the present case all these proceedings had been had before the bankruptcy proceedings against the International Coal Mining Company were initiated.

But even if this section had any application to the present case, is it not clear that the Trustee in Bankruptcy, before he could assert any rights under the claim which had been sold, must, by some proper proceeding, recover this claim from the purchaser, or establish his right as against the purchaser to assert the same against the debtor? Manifestly, the Trustee could not ignore the sale made by the State Court, and proceed as if it had never taken place, for even if the validity of the sale is open to attack, the purchaser thereat must have his day in court, and this he could only have in a proceeding between him and the Trustee, in which the issue involved was the validity of the sale and of the title acquired thereunder.

It would seem to be clear, therefore, that the mere initiation of the proceedings in bankruptcy, within a period of four months after the sale and the subsequent adjudication of bankruptcy, did not, of themselves, operate to vest in the Trustee title to the claim on which the present action is founded, which title had passed to a third person under the judicial sale referred to prior to the institution of the bankruptcy proceedings.

The Circuit Court in overruling the demurrer to the replications did not refuse to give effect to the sale made by the Court of Common Pleas of Philadelphia County on any of the grounds above referred to. The sale was held invalid and void because, in the judgment of that Court, the Court of Common Pleas of Philadelphia County had no authority to make sale of the choses and claims in action of the defendant in error, this conclusion being rested upon a decision of the Supreme Court of the State of Pennsyl-

vania which, in the opinion of the Circuit Court, had determined that sales of choses and claims in action of a defendant could not be made pursuant to the Statute of Pennsylvania under which the sale of the defendant in error's choses and claims in action had been made. (Transcript of Record, p. 139.)

Waiving, for the moment, the question of the right of the Circuit Court to review the correctness of the conclusion reached by the Court of Common Pleas of Philadelphia County as to the scope and effect of this statute, we submit that the decision relied upon by the Circuit Court did not establish that the Court of Common Pleas had misconstrued the terms of the statute under which it acted. The case thus relied upon was *Hogg's Appeal*, 88 Pa. St. 195. In that case the question to be determined was whether there had been a sale of debts or choses in action due to a railroad company against whom proceedings in the way of execution process had been had under a statute of the State of Pennsylvania passed in 1870, which constituted the basis for the execution proceedings against the defendant in error which we are concerned with. A *per curiam* opinion was delivered by the Supreme Court of Pennsylvania, in the course of which it was said that the sale which was under consideration in that case "*did not* pass to the purchaser the debts or mere choses in action due to the company from others." The Court did not say that the sale it was considering could not have passed such choses in action, but only that it did not, and that the conclusion reached was quite justified is evident from the statement of the case which is embodied in the report, from which it appears that the execution and sale made thereunder had extended by terms only to the *railroad* of the defendant; no attempt had been made to embrace the claims or choses in action, and consequently the question whether such claims or choses in action could have been sold was not before the Court.

But assume for the sake of argument that error had been committed by the Court of Common Pleas of Phila-

delphia County, and that under a proper construction of the statute under which it was acting the choses in action and claims in action of the defendant in error were not the subject of sale, or that the sale had been brought about by some combination or conspiracy which, when established, would have resulted in the setting aside of it, can it be possible that any other Court than that which made the sale, can at the instance of, and for the benefit of, a party to the proceeding in which the sale was had, and in the absence of a party vitally interested, to wit, the purchaser at the sale, take under review the proceedings had in the case with the view of correcting the wrong done or the error committed by the other Court?

Such a view is opposed, we submit, to an unbroken current of decisions of this Court.

In *Nogue vs. Clapp*, 101 U. S. 551, this Court held that the Circuit Court of the United States for the District of Louisiana could not entertain a bill, the purpose of which was to obtain relief from the effect of a sale made under the order of a State Court of Louisiana in a proceeding to which the plaintiff in the case, in the Circuit Court, had been a party, the allegation being that the sale was void because of an alleged fraudulent conspiracy to cheat him out of a lien on the land sold.

"The main purpose of this Bill," said Mr. Justice MILLER, "perhaps its only real object, is to have the proceedings in the State Court declared void.

"That Court had jurisdiction of the parties and of the subject matter of the controversy. Complainant in this bill entered his appearance in that suit at a proper stage of it, to enable him to contest the right of Clapp to have the property sold. The debt for which it was to be sold was complainant's debt to Clapp.

"The usual mode in the Courts of Louisiana of contesting the right to foreclose a mortgage is by obtaining an injunction, after which the rights of the parties are judicially determined by the Court. Com-

plainant appeared and obtained an order for such an injunction.

"If this order was not obeyed it was for that Court, not this, to give remedy. If the Court below refused to do it, there was an appeal to the Supreme Court of the State. After the sale he could, by a motion of the court, have had it set aside; and that was the proper place for such a remedy.

"The laws of Louisiana also provide a remedy by a special proceeding, to have a declaration of nullity of judgment in such cases as this in the court where the decree is entered. There is no allegation that the plaintiff sought any of these remedies.

"We think that for this court, after all this has been done, to undertake to decree that what that court did is void, to sit in review on its judgment, and reverse its decree and set aside its sale, in a case where its jurisdiction is undoubted, is unwarranted by the relations which subsist between the two courts. It would be an invasion of the powers belonging to that court, and such a doctrine would, upon the simple allegation of fraud practiced in the court, enable a party to retry in a Federal court any case decided against him in a State court."

In *Herron vs. Dater*, 120 U. S. R. 464, in an action of ejectment, the plaintiff, in order to sustain his title, introduced the record and proceedings of the Orphans' Court of Philadelphia County which had resulted in a sale and conveyance of a part of the land in controversy. The admission of this record was objected to upon the ground that it appeared from the face thereof that the debts, for the payment of which the sale had been made, were barred by the Statute of Limitation, and that, as a consequence, the Orphans' Court had had no jurisdiction to make the order of sale. The record was received in evidence and its admission was assigned as error. In dealing with this assignment this Court said:

"It is scarcely necessary to cite authority in support of the proposition that the orders, judgments, and decrees of the Orphans' Court, in a case where

it had jurisdiction of the subject-matter, cannot be impeached collaterally; much less is it so in the present case, because the statute of Pennsylvania of March 29, 1832, 2 Brightly's Purdon's Digest, p. 1279, pl. 3 (11th ed.), provides as follows: 'The Orphans' Court is hereby declared to be a court of record, with all the qualities and incidents of a court of record at common law; its proceedings and decrees in all matters within its jurisdiction shall not be reversed or avoided collaterally in any other court; but they shall be liable to reversal or modification or alteration on appeal to the Supreme Court, as hereinafter directed.' * * *

In *Randall vs. Howard*, 2 Black 585, it appeared that the owner of land encumbered with a mortgage had arranged with the mortgagee that the mortgage should be foreclosed and the land bought in by the mortgagee for account of, and for the benefit of, the mortgagor; that pursuant to this arrangement the land had been so acquired through and by means of a proceeding in a State Court, and that thereupon the mortgagee, in violation of the agreement, had proceeded to deal with it as if it were his absolute property, in violation of his agreement to the contrary.

The mortgagor, or former owner, thereupon filed a bill in the Circuit Court of the United States for the Eastern District of Maryland, seeking redress.

In this proceeding it was not sought to attack or revise in any way the proceedings in the State Court which had eventuated in the sale of the land and its purchase by the former mortgagee; but, notwithstanding this, this Court held that the proceeding could not be sustained for the reasons which are sufficiently disclosed by the following extract from the opinion delivered by it:

"The Bill in this case brings in review various matters passed on in the progress of the suit by the Cecil County Circuit Court, a court of general jurisdiction, having complete control of the parties and of the subject-matter of the controversy.

"It seeks to annul a sale of lands made by virtue of a decree of the Cecil court, sitting as a court of

equity, in a cause depending between the same parties; to effect the distribution of the proceeds of the sale, to enjoin the defendant from making any disposition of the lands purchased by him; to disturb his possession, to invalidate his title, and to have the property resold.

"This is a direct and positive interference with the rightful authority of the State court. If there were error in the proceedings of the court a review can be had in the appellate tribunals of the State. If, as is charged, the decree is sought to be perverted, and made the medium of consummating a wrong, then the court on petition or supplemental bill can prevent it."

Other decisions to the same effect could be cited, but the above clearly indicate the rule which this Court has consistently applied when it was required to determine the effect to be given to acts or judgments of State Courts.

The rule adopted accords with the universally accepted theory as to the conclusiveness of judgments and judicial proceedings when attacked collaterally.

In *Freeman on Judgments*, Section 334, the rule is thus stated:

"The parties to an action cannot impeach or set at naught the judgment in any collateral proceeding on the ground that it was obtained through fraud or collusion. It is their business to see that it is not so obtained. If, without any fault or neglect of one party, his adversary succeeds, by fraud, in obtaining an inequitable and unauthorized judgment, he must take some proceeding prescribed by law to annul the judgment, and cannot, in the absence of such annulment, treat it as invalid. It is only third persons who have the right to collaterally impeach judgments. They are accorded this right because, not being parties to the action, nothing determined by it is, as to them, *res adjudicata*. The rule is correctly stated in Cowen, Hill and Edwards's note 291 to Phillips on Evidence, as follows: 'Judgments of any court can be impeached by strangers to them for fraud or collusion; but no judgment can be impeached for fraud by a party or privy to it.' A party to a judgment,

feeling himself aggrieved thereby may, in a proper case, either move that it be vacated, or prosecute an appeal or writ of error, or maintain a suit in equity to enjoin its enforcement. These, unless the judgment is void on its face, are the only remedies open to him, and if he resorts to neither, or resorting to any or all he is denied relief, he cannot avoid the judgment, when offered in evidence against him, by proving that it ought not to have been pronounced, and was procured by fraud, mistake, perjury or collusion, or through some agreement entered into by the prevailing party, and which he neglected or refused to perform."

And in Section 337 as follows:

"The parties to an action or proceeding, and all persons who, though not parties thereto, are not prejudiced by the judgment when rendered, will not be permitted to assail or avoid it in any collateral proceeding for error or irregularity, unless it was such as left the court without jurisdiction and the judgment absolutely void as between the parties thereto."

And so this Court in *Elliott vs. Peirsol*, 1 *Peters*, 329 held that "Where a Court has jurisdiction it has the right to decide any question which occurs in the cause, and whether its decisions be correct or otherwise, its judgments, until reversed, are regarded as binding in every other Court."

The conclusiveness of the proceeding in the Court of Common Pleas of Philadelphia County, to which we have referred, upon the right of the defendant in error to thereafter maintain any action upon its claim against the plaintiff in error was recognized by a State Court in Pennsylvania, the Court of Common Pleas No. 2 of the County of Philadelphia, the sale having been made by the Court of Common Pleas No. 1 of that county.

At the time the sale in question was made, an action was pending which had been brought by the defendant in error in the Court of Common Pleas No. 2 to recover in

respect to its State shipments because of the matters relied upon by it in the present action. In this action the sale made by Common Pleas No. 1 was set up as a bar to a further prosecution of the action, and was accepted as such by that Court.

"We are of the opinion," said the Court of Common Pleas No. 2, "that the only issue thus presented to us is to be tried by this record (*i. e.*, of the Court of Common Pleas No. 1), that the record discloses the divestiture of the assets by operation of law, and that we are bound by the same, and are without jurisdiction to examine it and modify its effect or to annul the change wrought in the status of the plaintiff."

While the Circuit Court undertook to, and did, exercise the right of supervising the proceedings had in the Court of Common Pleas No. 1 for the County of Philadelphia, and as a result of doing so reached the conclusion that the sale made by that Court was invalid and consequently ineffective, the Circuit Court of Appeals, while declining to treat the sale as a bar to the action, rested its conclusion not upon the ground on which the Circuit Court had proceeded, but upon the ground that, as the sale had not had the effect of relieving the plaintiff in error from liability to someone, it was immaterial to it whether that someone was or was not the defendant in error.

It may be conceded for the purposes of the argument that if the legal title to the claim remained in the defendant in error, it could continue to prosecute the present action; but in that event it was clearly, we submit, incumbent upon it to do so in such a manner as to permit the beneficial owner—viz., the purchaser at the sale—to in some way control the action, otherwise such beneficial owner would be in the position of having the validity of his claim adjudicated in an action to which he was not a party and over which he could exercise no control. And of course if the defendant in error was entitled to maintain the action, the judgment finally entered therein, whatever it was, would be conclusive as against any other owner of the claim.

Upon the theory or assumption, therefore, that the beneficial ownership merely of the claim passed to the purchaser at the sale, it was incumbent upon the defendant in error, if its purpose in the further prosecution of the case was to recover for the benefit of such beneficial owner, by proper proceedings to have had such owner made a party to the case as a "use plaintiff." This, of course, it failed to do, and indeed such action on its part would have been in direct conflict with the theory upon which it was proceeding, namely, that the sale was void, and that it consequently still remained the owner not merely of the legal, but of the beneficial title to the claim.

It will doubtless be admitted that if the legal title to, and not merely an equitable interest in, the claim which forms the basis of the present action passed to the purchaser at the sale, then the action was not maintainable thereafter by the defendant in error, for, as was said by the Supreme Court of Pennsylvania in the case of *Guarantee Trust Company vs. Powell*, 150 Pa. St. 16, "There is no precedent for putting the cart before the horse by allowing the legal plaintiff without title of his own to recover on the title of the plaintiff to use." If, therefore, the legal title to the claim did pass, the present action could not have been prosecuted by the defendant in error even though the purchaser at the sale had been added as the use plaintiff.

Did, then, the legal title to the claim embraced in the present action pass to the sheriff's vendee as the result of the sale made under the order of the Court of Common Pleas of Philadelphia County?

We fail to see how it can be successfully contended that the sale had any other effect. It will not, we assume, be denied that it was within the power of the Legislature of Pennsylvania to make provision for the sale of the absolute or legal title to claims and choses in action of a defendant in a judgment. Indeed, it has been expressly held in Pennsylvania in the case of *Levy vs. Levy*, 78 Pa. St. 507, that an assignee of a chose in action obtains the legal title

thereto and is consequently empowered to institute actions in his own name when the assignment is made in a state in which the assignee is recognized by its statutes as the legal owner. In the case referred to, the Supreme Court of Pennsylvania, in conformity with decisions rendered by the higher courts of the State of New York, held that an action upon a book account which had been assigned was properly brought in the name of the assignee thereof, the assignment having taken place in the State of New York, because it was provided by the Code of that State that "Every action must be prosecuted in the name of the party in interest, except as is otherwise provided by Section 131, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of a contract."

"The weight of authority," said the Supreme Court of Pennsylvania, "in the New York State Courts is very decided that the legal as well as the equitable title passes by an assignment of a chose in action under their Code. This is decisive of the case. The rule in this State is that the suit must be brought in the name of the holder of the legal title. If the plaintiffs were the holders of the legal title by the law of the State of New York where the assignment was made, they are the holders of it here, and their suit was well brought."

In the present case the judicial sale passed to the purchaser the legal title, we submit, to the choses and claims in action of the defendant in error. The order of the Court under which the sale was made directed the sheriff "to levy upon and to sell all and singular the chartered rights, privileges and franchises of the said International Coal Mining Company, including the franchise right to be a corporation, together with all property, real, personal and mixed, and all book accounts, claims, choses in action, causes in action, arising out of contracts, torts or penalties, and assets of every description belonging to or in any way appertaining to said International Coal Mining Company, excepting only lands held in fee."

How can it possibly be successfully argued that this sale did not pass the legal title to the claim which is sought to be enforced in the present action, especially when by such sale the "franchise right to be a corporation" of the defendant in the execution passed to and became vested in the purchaser? It would certainly be anomalous to treat the sale made as intended to pass merely the equitable title, leaving the legal title in a corporation whose very existence would be terminated by the sale.

And apart from this consideration, is it conceivable that the Legislature intended that a purchaser of a claim or chose in action should only be at liberty to proceed thereon in any court in the name of the defendant in the execution? It can hardly be assumed that the latter would be very desirous of co-operating in proceedings intended to secure for others the proceeds of claims of which he had been deprived by judicial sale, and unless required to do so by reason of the language of the statute, courts, we submit, ought not to adopt a construction which would put the purchaser in such a position.

The State Court in which the action was pending which had been brought by the present defendant in error to recover as to its State shipments because of the lower rates on contract coal held that the action could not be prosecuted after and because of the sale.

"What we decide is," said the Court in that case, "that the sale of the assets of the plaintiff herein described as made under execution of the judgment of a Court of concurrent jurisdiction standing undisturbed by appeal or otherwise operated to pass the present claim to the sheriff's vendee, and that vendee or his successor in title can alone avail himself of it. A recovery here by the plaintiff could not relieve the defendant of the obligation to pay such substituted claimant."

International Coal Mining Company vs. Pennsylvania Railroad Company, 38 Legal Intelligencer, page 260.

5. REFUSAL OF THE TRIAL JUDGE TO GIVE INSTRUCTION REQUESTED RELATIVE TO THE CREDENCE TO BE GIVEN TO EVIDENCE OF THE SECRETARY OF THE DEFENDANT IN ERROR.

The plaintiff in error had requested the Court to charge the jury as follows:

"Point 8. The evidence establishes the fact that the plaintiff itself did not pay the freights a portion of which it now claims a right to recover. Payment of these freights, as the evidence shows, was made by those who purchased the coal from the plaintiff on which the freights were paid.

"In order to entitle the plaintiff to recover it must have established to your satisfaction that under the terms of sale of this coal it, and not the purchasers, would have received the benefit of any reduction in the rate. The only evidence as to the terms of sale is that given by Mr. Wilson. The credibility of his testimony is for you to consider. If you are not satisfied to accept it as true, the plaintiff cannot recover. In considering the credit which you should give to Mr. Wilson's testimony on this point, it is due to the defendant that you should take into account the fact, if it be a fact, that the testimony of Mr. Wilson on other points or the statements embodied in the record of this case, which he has sworn to, have been shown to have been either false or inaccurate, and that you should further consider whether any circumstance has been established which fairly excuses the non-production by the plaintiff of its books showing the character of the transactions between itself and the purchasers of the coal."

This instruction the learned trial Judge refused to give, because he considered that it was immaterial whether the freights had or had not been paid by the consignees of the coal for account of the defendant in error.

This, we submit, was a mistaken view. If the freights which admittedly were paid by those who purchased the coal from the defendant in error were not paid

for its account, and if the defendant in error consequently would not have benefited had the rates charged been less than they were, then clearly it was not in a position to maintain any action in respect to the rate of freight, for it had not been injured nor had it sustained any damages as the result of the exaction by the plaintiff in error of rates higher than it was legally justified in charging.

That the instruction requested was warranted by the circumstances disclosed in connection with the trial of the case was conceded by the trial Judge. These circumstances were these :

In its Statement of Claim the defendant in error's shipments had been overstated to the extent of some thousands of tons. This fact was developed by the examination made of the defendant in error's books by the Accountant or Auditor appointed by the Court. The only explanation offered by Mr. Wilson, the Secretary of the defendant in error, under whose supervision the statement of its shipments had been made up, was that which will be found at page 309 of the Record, and which was as follows :

"It is a clerical error. I don't know whether it occurred in my taking it off the books to furnish it to my counsel or whether it is a typographical error."

In the Statement of Claim it had been averred that the defendant in error had not discovered that allowances were being made on shipments of contract coal until November, 1904, upon the trial of another action which had been instituted by the defendant in error against the plaintiff in error in the Court of Common Pleas of Philadelphia County. After it had developed upon the trial of the present case from Mr. Wilson's own testimony that he had been told by the Coal Freight Agent of the plaintiff in error of these allowances in April, 1899, he was asked how he could reconcile his testimony in the case with his sworn allegation in the Statement of Claim, and the only answer he could give was as follows :

"A. I think what I must have meant to say there was it became a public matter at the time of the trial that that was the case."

(Transcript of Record, page 311.)

In the Statement of Claim it was further alleged that in the period during which the defendant in error had received freight adjustments or allowances the sums paid to it on this account had varied from 10 to 25 cents per ton. It was shown upon the trial as a result of the examination of the defendant in error's own books that these adjustments had in no case been less than 25 cents per ton, and had varied between that figure and 75 cents per ton.

Mr. Wilson's attention was called to this discrepancy, and he was asked the following question:

"A. If you have any explanation to make, I would like to know what it is, as to the statement which you swore to in this case that you received prior to April 1, 1899, rebates running from 10 to 25 cents per ton?"

To which he replied as follows:

"A. I don't know that there is any explanation for that. It is there, and it wasn't saying enough. If my attention had been called to that, I certainly would have made the last figure higher. That was probably written when I wasn't looking at the matter as carefully as I might, with reference to the higher amount paid."

(Transcript of Record, page 307.)

In testifying in chief, Mr. Wilson had contrasted certain rates charged to the Berwind White Coal Mining Company and to the defendant in error, and in every instance stated that the rates charged the former company were lower. An example of this character of testimony will be found at page 264 of the Transcript of Record.

"Q. Now take another point.

"A. Long Island City.

"Q. What did you pay?

"A. The tariff rate, \$1.85.

"Q. What was charged under this adjustment to Berwind White & Company?

"A. \$1.10.

"Q. That made a difference of how much against you?

"A. 75 cents."

After it had been established that on the Long Island City shipments the defendant in error had paid \$1.10, the same rate that the Berwind White Company had paid, and not \$1.85, Mr. Wilson was asked to explain why he had stated that \$1.85 had been paid, and his explanation was this:

"I told you the tariff rate. That is what I was answering him.

"Q. You thought that was a full and true answer, although you knew, in point of fact,—

"A. It was an answer to his question."

(Transcript of Record page 309.)

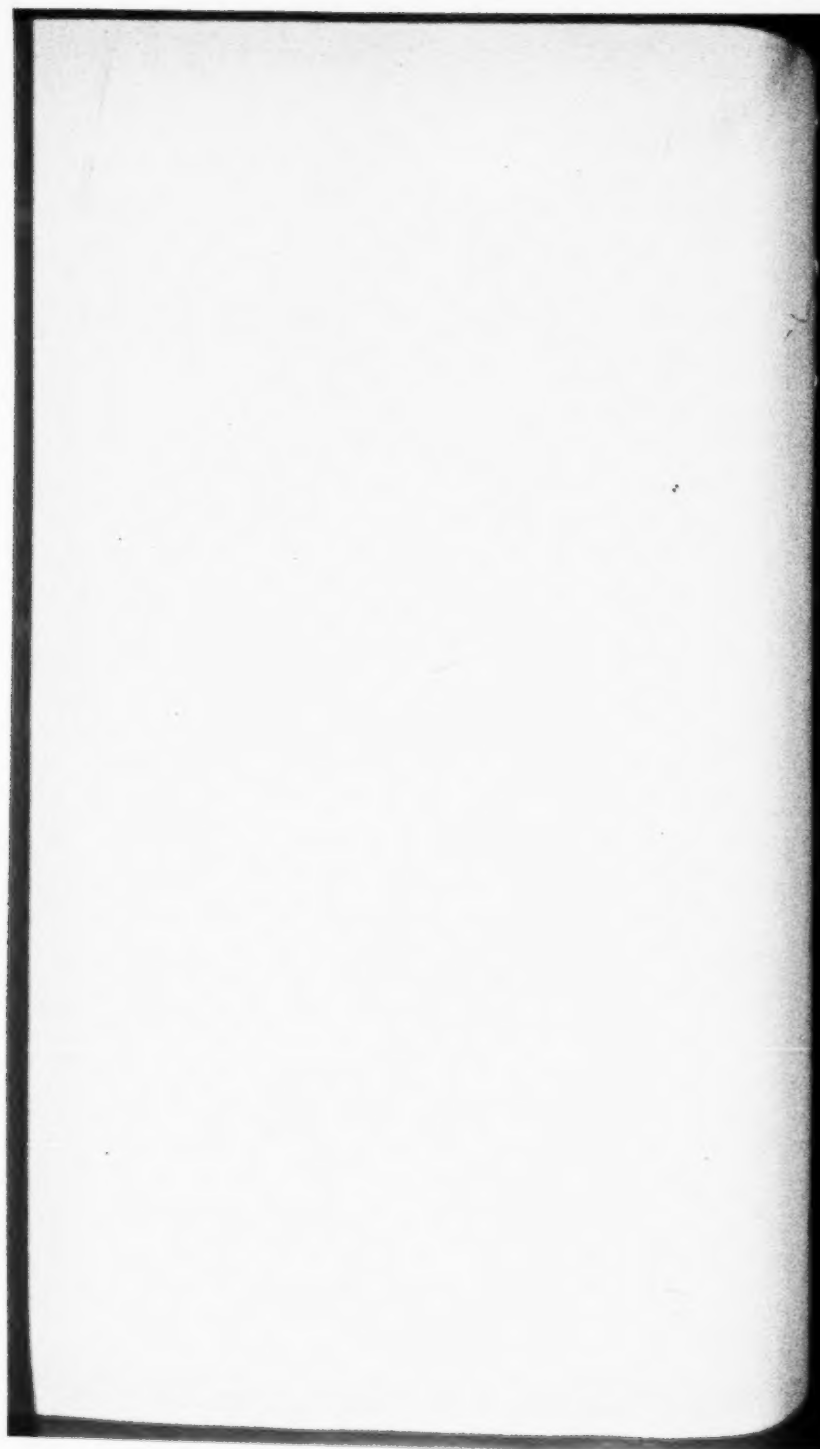
In view of the record which Mr. Wilson had made for himself in this case, the jury would have been amply justified, we submit, in wholly disregarding any testimony given by him in so far as this was unsupported by any other witness or by any books or records.

There was no other witness called to substantiate his statements as to the terms upon which the coal was sold and he was unable to produce any books covering these transactions, due to their disappearance in some manner which was not very satisfactorily explained. If his testimony were to be disregarded, then the defendant in error had failed to establish, we submit, what was a necessary prerequisite to its recovery, viz., that the charges paid on the coal embraced in the action were really paid by it, though through the hands of the purchasers of the coal.

FREDERIC D. MCKENNEY

FRANCIS I. GOWEN

For Plaintiff in Error



FILED
JAN 19 1912

JAN 19 1912

JAMES W. MCKENNA

14

SUPREME COURT OF THE UNITED STATES

PENNSYLVANIA RAILROAD COMPANY,

Plaintiff in Error

**INTERNATIONAL COAL MINING COM-
PANY,**

Defendant in Error

*In Error to the United States Circuit Court of Appeals for
the Third Circuit.*

Brief on Behalf of the Defendant in Error.

JAMES W. M. NEWLIN,

WM. A. GLASGOW, JR.,

Counsel for Defendant in Error.

IN THE
Supreme Court of the United States.

October Term, 1911. No. 168.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

INTERNATIONAL COAL MINING COMPANY,
Defendant-in-Error.

**In Error to the United States Circuit Court of Appeals
for the Third Circuit.**

**BRIEF ON BEHALF OF THE DEFENDANT-IN-
ERROR.**

SHORT STATEMENT OF FACTS.

This case comes before the Court upon a state of facts which may be briefly set forth, wherein, and in the Argument following, the word "plaintiff" will be used to designate the plaintiff in the Circuit Court, defendant-in-error, and the word "defendant" will be

used to designate the defendant below, plaintiff-in-error in this Court.

1. The plaintiff is a coal company engaged in selling and shipping coal from the "Clearfield District", embracing certain mines which the Pennsylvania Railroad Company, for rate purposes, groups together on the same rate basis, and the rates are published by said Company as from such group, and the published rates from each mine therein are the same.

2. Before March 3, 1899, the Pennsylvania Railroad Company had made a practice of granting rebates to shippers of coal; such rebates were unequal in amount, as among shippers, and were repaid to the shippers after the published rate had been collected.

3. On April 1, 1899, the railroad company made a general advance in its coal rates, and published a tariff covering the same. The rates so published included rates from the "Clearfield District."

4. After April 1, 1899, shipments of coal were carried over the railroad for the Berwind-White Coal Mining Company, and a number of other shippers, at a rate less than the published tariff rate or the rate charged other shippers, a rebate being paid these favored shippers after collection of the published rate.

5. Some of these shipments were coal sold by such favored shippers before April 1, 1899, when the increased rates became effective, while other shipments were coal sold after that date.

6. After April 1, 1899, the International Coal Mining Company shipped coal over the Pennsylvania Railroad, for which it paid the published rates, and no re-

bates were allowed to it. Part of the coal so shipped was bought from operators in the "Clearfield District," and was collected and shipped on the Huntingdon & Broad Top Railroad, a railroad connected with the Pennsylvania Railroad, and the mines upon which had been grouped by the Pennsylvania Railroad Company and the Huntingdon and Broad Top Railroad Company, for rate purposes, as part of the "Clearfield District." All the shipments were under tariffs published by the Pennsylvania Railroad Company.

7. On July 29, 1904, the International Coal Mining Company brought suit against the Pennsylvania Railroad Company in the Circuit Court of the United States for the Eastern District of Pennsylvania, setting forth the above facts, and claiming to recover the sum of \$37,268.85, being the difference between the amount paid by plaintiff under the published rates and the amount chargeable under the lower rates made to the favored shippers from the "Clearfield District" over the Pennsylvania Railroad.

8. On August 15, 1901, an action for debt had been instituted in a Pennsylvania Common Pleas Court by the Cresson and Clearfield Coal and Coke Co., whereby the property of the International Coal Mining Company was made the subject of a sale under execution on September 29, 1905, and was bid in by P. H. Walls, an officer of the Cresson and Clearfield Coal & Coke Co., for the sum of \$40.00. The regularity and good faith of this sale were both denied by the International Coal Mining Company, and it was also denied that the effect of such sale was to pass title to the right of action in this cause.

9. On December 5, 1905, a petition in bankruptcy was filed by a creditor of the International Coal Min-

ing Company, and on February 21, 1906, the Company was declared bankrupt, and the trustee took charge of the assets, including the pending suit, in which he was substituted as plaintiff.

10. A special plea was put in, alleging the fact of the above sale in bar of the action, in the Circuit Court. To this a replication was filed on a number of grounds, one of which was that the sale was in pursuance of a fraudulent conspiracy to abate the present proceeding. The court overruled a demurrer to the replication. Judgment was subsequently entered against defendant by default, under this plea, for want of a rebutter.

11. The case was tried on the merits, under the pleas of *non assumpsit* and statute of limitations. At the trial, defendant offered in evidence the exemplification of the record of the Pennsylvania Common Pleas Court, showing the Sheriff's sale. This offer was overruled.

12. The Circuit Court restricted recovery to the period of six years prior to the date when the suit was instituted, and to the period during which shipments were made by plaintiff under the published rates, and held, that, as to such period, plaintiff was entitled to recover the difference between the published rate paid by it and the lower rate charged favored shippers for the same service. The case was submitted to the jury, and a verdict rendered for the sum of twelve thousand and thirteen dollars and fifty-one cents (12,013.51), upon which judgment was entered by the Circuit Court.

13. This judgment was affirmed by the Circuit Court of Appeals for the Third Circuit. From which judgment the Pennsylvania Railroad Company has appealed, to this Court.

ARGUMENT.

The questions raised by the appeal in this case are capable of being briefly stated. They have been grouped by the plaintiff in error (hereinafter called defendant) under five heads, which will be considered, for convenience in the order in which they are presented.

Before discussing the propositions announced under these heads, however, counsel for defendant (Defendant's Brief, pp. 21-27) have here raised a preliminary question as to the jurisdiction of the Circuit Court in this case. This question was not raised at any previous time during the proceedings, extending over the past seven years, and should not commend itself at this time to the Court.

The contention of the defendant seems to be that the present proceeding should have been primarily begun before the Interstate Commerce Commission, and, having been initiated and brought to final judgment in the Federal Courts, the cause must fail.

By Section 9 of the Interstate Commerce Act, it is provided:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

This, if it means anything, certainly contemplates

two alternative remedies for the use of persons complaining of violations of the Act. That the remedies are alternative and co-existent, is emphasized by the provision requiring the prospective plaintiff to elect between them, and confining him after election to his chosen remedy. If the necessity of an award by the Commission is as absolute as suggested by defendant, the remedy by suit in the Circuit Courts is not available, and a plain provision of the Act, of remedial character, is a nullity for reasons which go only to the convenience of its exercise in a particular class of cases; and the plaintiff would be left, after long and expensive litigation, without any remedy as to the greater part, if not all of its claim, while the defendant, after opposing every obstacle to a *prima facie* meritorious claim, and after two defeats in the forums to which it never objected, would be enabled to depart with a judgment in its favor for costs, by reason of an objection first raised in the Court of last resort.

It is confidently submitted, however, that no such rule as that suggested by defendant was ever announced or contemplated by this Court. The cases of *B. & O. R. R. Co. v. Pitcairn Coal Co.*, and *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.* (cited by defendant), certainly contain no such rule, and are distinguishable from the present case upon a number of grounds.

(a). This Court has never held, nor is it believed that it will ever hold, that, in a clear case of a rate discrimination between shippers of the same commodity over the same line under substantially similar circumstances of carriage, *brought about by giving secret rebates from the published tariff*, an award by the Interstate Commerce Commission is a

necessary prerequisite to a suit in the courts for the recovery of damages under Sections 8 and 9 of the Act to Regulate Commerce. It may well be that where the question raised is of a discrimination in facilities (as in the *Pitcairn* case), or where the question raised is one of the "reasonableness" of an existing rate, (as in the *Abilene Cotton Oil Co. Case*), an award by the Commission may be prerequisite to a determination whether the practice in question is, under all the circumstances and conditions, unjustly discriminatory, or whether the rate charged is unreasonable. But no such question arises where the points of origin are the same (as from a Group District), the points of destination are the same, the rate is published, and a rebate is allowed to one of two shippers of the same commodity under substantially similar circumstances and conditions.

In the case of *Texas & Pacific Rwy. Co. vs. Abilene Cotton Oil Company*, 204 U. S., 426, this Court held, that, in a suit brought by a plaintiff charging that the defendant had charged an unreasonable rate, which was forbidden by the First Section of the Act to Regulate Commerce, the Circuit Court should not entertain primary jurisdiction, but the facts should first be submitted to the Interstate Commerce Commission, especially created for the purpose, to pass upon whether the rate charged was unreasonable.

In the case of *Baltimore & Ohio Railroad Company vs. Pitcairn Coal Company*, 215 U. S., 481, the plaintiff charged that the defendant had been guilty of unjust discrimination in its car distribution, and this Court held that the Circuit Court should not have taken jurisdiction until the Interstate Commerce Commission had primarily passed upon the question, whether the defendant was guilty of unjust discrimination under Section 3 of the Act to Regulate Commerce as charged.

In the present case, however, the action is brought under Section 2 of the Act to Regulate Commerce, which is as follows:

“Sec. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.”

And when the plaintiff shows that it was charged greater compensation for service rendered in the transportation of property, than the defendant charged “any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions”, then there is no administrative discretion to be exercised by the Interstate Commerce Commission, for the law, as contained in Section 2, declares that under such facts the defendant “shall be deemed guilty of unjust discrimination”, and nothing is left for the Commission to pass upon, and the Circuit Court, with a jury, can pass upon the question of whether the plaintiff had been charged greater compensation than others just as well as the Commission, without in any way impairing other provisions of the Act to Regulate Commerce.

In the case of *Wight vs. United States*, 167 U. S. 512, the facts shown were that the defendant charged to one person greater compensation under substantially similar circumstances and conditions, for like service, than it charged the other, who was charged less than the published tariff rate. Wight was convicted, and it is difficult for us to see why a District Court may pass upon facts constituting a violation of Section 2 of the Act to Regulate Commerce in a criminal case, but cannot do so in a civil proceeding.

The present is a case where, when the facts are found, no exercise of administrative discretion is vested in the Interstate Commerce Commission to find whether or not such facts constitute discrimination, but, as stated above, the law declares such facts to constitute "unjust discrimination", and we submit that the case was properly brought in the Circuit Court of the United States.

(b). There is no question here of a general practice, calling for the exercise of administrative discretion by the Interstate Commerce Commission, and the prescribing a course of conduct for the future, but only a secret rebate paid back to certain favored shippers at a time when a published rate was in effect. It is true that an effort was made to justify this rebate on the ground that it was given only to protect shippers having contracts in effect at the time when the increased rates came into effect. The record shows that this was not true in every instance, and that rebates were in fact given on new contracts in some cases (Record, p. 386, Exhibit C, Note 1). But taking the claim of defendant as made, it is of no merit. In *Armour Packing Co. v. United States*, 209 U. S. 56, the claim that a railroad company might protect a contract rate after the publication of a tariff establishing a new

increased rate, was expressly denied. In that case, this Court said (p. 80):

“It is strongly urged that there is nothing in the acts of Congress regulating interstate commerce which can render illegal the contract between the shipper and the railroad company covering the period from June to December, 1905. The contract, it is insisted, was at the legal, published and filed rate, and there is nothing in the law destroying the right of contract so essential to carrying on business such as the petitioner was engaged in. But this contention loses sight of the central and controlling purpose of the law, which is to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available to every shipper. In the Elkins Act, Congress has made it a penal offense to give or receive transportation at less than the published rate. This rate can only be raised by ten days’ or lowered by three days’ notice. Sec. 6, 25 Stat. 855. There is no provision excepting special contracts from the operation of the law. One rate is to be charged and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart. It is said that if the carrier saw fit to change the published rate by contract, the effect will be to make the rate available to all other shippers. But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the

only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish. Nor do we find anything in the provisions of the statute inconsistent with this conclusion in the fact that the statute makes the rate as published or filed conclusive on the carrier. The carrier files and publishes the rate. It may well be concluded by its own action. But neither shipper nor carrier may vary from the duly filed and published rate without incurring the penalty of the law. * * *

* * * If the shipper sees fit to make a contract covering a definite period for a rate in force at the time he must be taken to have done so subject to the possible change of the published rate in the manner fixed by statute, to which he must conform, or suffer the penalty fixed by law."

See, also,

Chicago, B. & Q. R. Co. vs. U. S., 157 Fed. 830.

If the carrier cannot in terms contract to continue a certain rate after its change, by publication of a new increased rate, without being criminally liable under the Act, how can it be seriously suggested that he can protect the contracts of others by a rebate from the published rate, and not be guilty of a violation of the Act? And, if the highest Court in the Country has determined that such a practice is a violation of the Act, how can it be demanded that a case involving such a practice be returned to the Commission, in a civil case, to have them declare the same illegal, when it is unnecessary to do so in a criminal case? There being, therefore, no justification of the necessity for requiring the disapproval by the Commission of the act of the carrier, the Federal Court retains its original jurisdiction, and the

decision in the Abilene Cotton Oil case does not hold the contrary. As was recently said, illustrating our position, in *Langdon v. Pennsylvania R. R. Co.*, 186 Fed. 237, 240:

“The original jurisdiction of the Federal Court under Section 9 has not been entirely destroyed, but it still may redress ‘such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the commission’, and whenever a complainant comes into the courts to redress a wrong which he alleges has resulted from some discriminatory act of a common carrier, it will always be necessary in the first instance to determine whether or not it is a wrong which can be redressed by the courts. In cases where the wrong complained of is alleged to result, not from a regulation, but from a secret practice, applicable only to a few favored shippers along the line, the question as to whether the commission must first pass upon the illegality of the practice has not been decided.”

(c). This brings us to a third consideration, which is that the case cited as ruling that a proceeding before the Commission is a necessary prerequisite to recovery in such a case as the present, in fact holds the contrary. What was held in *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, (for the Pitcairn case, being under Sections 3 and 23, is not directly in point), was that a lawful schedule, duly filed and published under the provisions of the Interstate Commerce Act, was, *prima facie*, the proper and reasonable rate, until another rate had been fixed by an award of the Commission, and that the reasonableness of the rate could not be attacked primarily in a court. In the present case, the charge against the carrier is that it published and filed a schedule of rates, and, thereafter, proceeded to give rebates from such rates to certain favored shippers; and

the very reasoning which was used by this Court in that case, shows the utter uselessness of requiring primarily an award by the Commission in such a case as the present. That it was not the intention of this Court in the *Abilene Cotton Oil* case, to entirely deny the original jurisdiction of the Federal Courts in proper cases, was expressly stated, the Court saying (p. 442):

"It is observed that the power of the courts to award damages to those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant, redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the act; in other words, to command a correction of the established schedules, which power, as we have shown, is conferred by the act upon the Commission in express terms. In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission."

The case of *Morrisdale Coal Co. v. Pennsylvania R. R. Co.*, 183 Fed. 929, referred to by defendant, is easily distinguishable from the *Abilene Cotton Oil* case, and is now on the Docket of this Court for argument, and we will reserve our comments on the decision in that case until it is called for argument.

After stating the several questions of law relied upon by defendant (Defendant's Brief, p. 28), and before proceeding to argument on the same (pages 29-33 of Defendant's Brief), defendant makes a

preliminary statement, alleging that it has not argued the question as to the reasonableness of the alleged practice of the carrier, because, as it understands the ruling of the Court in *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U. S. 235, the Supreme Court has no authority to consider the discriminatory character of any practice until a finding of fact has been had by the Interstate Commerce Commission.

It might be a sufficient answer to this to say that defendant has not brought itself in reach of the rule by showing any such "practice," nor by showing that it was applied in the present case. There are no contracts in evidence, and the Record does not show that a discrimination was made exclusively on the basis of such contracts.

But passing this, the defendant has evidently misinterpreted the decision of this Court in *Interstate Commerce Commission v. Delaware &c. R. Co.*, *supra*. The point of law arising in that case, to wit, whether the carrier can discriminate in rates because of the ownership of the goods, or of any circumstances or conditions applying to the shippers and not to the carriage of the goods, was expressly decided in the negative, and is controlling in this case. If the carrier cannot consider the shipper or owner, how can it justify a discriminatory practice on the sole ground that it was intended to protect the shipper's contracts previously made. As was said by this Court in the above case (p. 255):

"This is not merely the result of an implication from the finding of the Commission, since it was affirmatively found that to permit the carrier to exclude the forwarding agent would be to produce preference and discrimination. The contention then comes to this—that carriers should be

permitted to give preferences and make discriminations as a means of preventing those unlawful conditions from arising."

There is no question here of the right to carry for a less rate carload as against less than carload shipments. That question was raised in the *Delaware L. & W. R. Case*, and was a proper matter for the Commission to consider and pass upon, being a practice involving circumstances and conditions of carriage. This Court held, that the Commission's finding that such a practice was unjustly discriminatory, is binding as a finding of fact, and refused to review it on the merits. But it did not hold that an alleged practice, depending entirely upon a circumstance affecting the shipper and not the carrier, must be the basis of a preliminary finding of fact by the Commission. On the contrary, they held that such a practice was reviewable, and was necessarily discriminatory, and in this case when the facts are found, the law declares such facts to be "unjust discrimination". This Court had already held in the *Armour Packing Co. Case*, *supra*, that the same practice here alleged was unjustifiable, and in plain violation of the Act.

As to the publication of the rate, it does not follow (as defendant suggests, Defendant's Brief, p. 30), that because it is not conclusive *in favor* of the carrier as to the reasonableness of such published rate, it is not conclusive *against* the carrier. The carrier publishes the rate of its own choice, and, if it wishes to change, it can do so in the manner provided by the Interstate Commerce Act. So long as it maintains a published tariff, it is clearly concluded as to the reasonableness of the rates charged therein (see *Armour Packing Co. vs. U. S.*, *supra*), and cannot favor any shipper, by giving a rebate on the rate

so charged, without being liable in damages to other shippers thereby unjustly discriminated against, as declared by Section 2 of the Act.

The Pennsylvania cases cited are scarcely conclusive of the common law rule. Granting, as defendant claims (Defendant's Brief, p. 32), that "the Interstate Commerce Act has but written into the Federal law the common law obligations resting upon common carriers," it will be found that the great weight of authority in the State, Federal and English Courts has always held that the published rate (or lowest rate charged) as against the carrier, is, *ipso facto*, the reasonable rate, and that any deviation therefrom is an unjust discrimination calling for damages.

So in *Samuels v. Louisville & Nashville R. Co.*, 31 Fed. 57 (1887), where there were two rival lines of steamboats on a river, plying between the same points, and carrying freight for hire, both bearing the same relation to a railroad company and both seeking its services to forward their freight to the same points of destination, and the company systematically discriminated against one by charging 50 cents a hundred more for freight than the other, it was held liable in damages at the suit of the line so discriminated against.

The Court said (p. 59):

"The demurrer, however, goes to the point that the mere fact that the defendant charged a higher price to the plaintiffs than to the line of rival steamboats is no ground of complaint, unless it is alleged that the price charged the plaintiffs was unreasonable. In other words, the proposition seems to be that the defendant had the right to make the discrimination up to the point that the charge became unreasonable and that charging a less price to the rival line of boats is no ground of complaint, unless the larger price is an unreasonable one. It is said that to charge one

too little for a service is not to charge another too much for the same service; that the smaller charge does not make the greater charge more than the service is really worth, for that the service may have been worth every penny asked and received for it. Concede that, then it follows that the defendant company was serving the steamboats Wilder and Chattanooga for a less hire and compensation than the service was really worth; and the practical result to these plaintiffs, as carriers on the river, is the same, whether the defendant charged them 50 cents per hundred too much, or charged their rivals 50 cents per hundred too little. In either case, the defendant railroad company makes the discrimination, and the plaintiffs lose and are deprived by the defendant of their equal right and opportunity for business as common carriers on the river. And the question recurs, what right, or upon what ground, can this public servant, owing an equal duty to the entire public, say to one, 'I will serve you for less than I will serve your neighbor'?"

In *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407, the Court said (p. 410):

"I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons for an identical kind of service, under identical conditions. Such partiality is legitimate in private business, but how can it square with the obligations of a public employment? A person having a public duty to discharge, is undoubtedly bound to exercise such office for the equal benefit of all, and, therefore, to permit the common carrier to charge various prices, according to the person with whom he deals, for the same services, is to forget that he owes a duty to the community. If he exacts different rates for the carriage of goods of the same kind, between the same points, he violates, as plainly, though it may be not in the same degree,

the principle of public policy which, in his own despite, converts his business into a public employment. The law that forbids him to make any discrimination in favor of the goods of A over the goods of B, when the goods of both are tendered for carriage, must, it seems to me, necessarily forbid any discrimination with respect to the rate of pay for the carriage. I can see no reason why, under legal rules, perfect equality to all persons should be exacted in the dealings of the common carrier, except with regard to the amount of compensation for his services. The rules that the carrier shall receive all the goods tendered, loses half its value, as a politic regulation, if the cost of transportation can be graduated by special agreement so as to favor one party at the expense of others. *Nor would this defect in the law, if it existed, be remedied by the principle which compels the carrier to take a reasonable hire for his labor, because, if the rate charged by him to one person might be deemed reasonable, by charging a lesser price to another for similar services, he disturbs that equality of rights among his employers which it is the endeavor of the law to effect. Indeed, when a charge is made to one person, and a lesser charge, for precisely the same offices, to another, I think it should be held that the higher charge is not reasonable; a presumption which would cut up by the roots the present agreement, as, by the operation of this rule, it would be a promise founded on the supposition that some other person is to be charged more than the law warrants."* (Italics ours.)

The same case came again before the Supreme Court of New Jersey, 37 N. J. L. 531, and the Court said (p. 534):

"Because the institution, so to speak, is public, every member of the community stands on an equality as to the right to its benefit, and, therefore, the carrier cannot discriminate between indi-

viduals for whom he will render the service. In the very nature, then, of his duty and of the public right, his conduct should be equal and just to all. *So, also, there is involved in the reasonableness of his compensation the same principle. A want of uniformity in price for the same kind of service under like circumstances is most unreasonable and unjust, when the right to demand it is common. It would be strange if, when the object of the employment is the public benefit, and the law allows no discrimination as to individual customers, but requires all to be accommodated alike as individuals, and for a reasonable rate, that by the indirect means of unequal prices some could lawfully get the advantage of the accommodation, and others not. A direct refusal to carry for a reasonable rate would involve the carrier in damages, and a refusal, in effect, could be accomplished by unfair and unequal charges, or if not to that extent, the public right to the convenience and usefulness of the means of carriage could be greatly impaired. Besides, the injury is not only to the individual affected, but it reaches out, disturbing trade most seriously. Competition in trade is encouraged by the law, and to allow any one to use means, established and intended for the public good, to promote unfair advantages amongst the people and foster monopolies, is against public policy, and should not be permitted."* (Italics ours.)

Some of the cases holding this rule were cited and approved by this Court in the *Delaware, L. & W. R. Co.'s case*, *supra*.

The Pennsylvania Cases cited moreover, have recognized as a sufficient defence, in a suit to recover damages for unlawful discrimination between shippers, the absence of wrongful intent on the part of the carrier, and are, therefore, no authority in a case for

wrongful discrimination between shippers, in violation of Section 2 of the Interstate Commerce Act. In *Borda v. Pa. R. Co.*, 141 Pa., 484 (Defendant's Brief, p. 32), the Supreme Court affirmed the referee's findings because the facts upon which such findings were based were not brought before the Court. The referee had, however, found (p. 493):

"The plaintiffs can recover in this action damages for unjust discrimination on the coal shipped by them as factors, as well as on that owned by them in their own right."

Damages were refused on the ground that, while there had been improper discrimination, it was not "wilful discrimination * * with the dishonest design of building up the fortune of" one shipper "at the expense of" the other.

The case of *Hoover v. Pa. R. Co.*, 156 Pa. 220, (Defendant's Brief, p. 33) was decided upon practically the same grounds, and, moreover, was a case under a drastic Pennsylvania State statute, providing for the recovery of treble damages.

The defendant's argument disregards the fact that, under Section 2 of the Interstate Commerce Act, when a common carrier is shown, "by any special rate, rebate, drawback, or other device", to have charged, demanded, collected or received from any person, "a greater or less compensation for any service rendered, or to be rendered in the transportation * * * of property, subject to the provisions of this Act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions", the Act fixes the fact that such

common carrier is "guilty of unjust discrimination", and that such discrimination is "unlawful".

The facts in this case show, that the service rendered was like transportation of a like commodity, during the same period of time, and that, while all such shipments moved, under a published tariff, between a designated Group District of origin and a common destination, the carrier repaid by rebates to certain favored shippers a part of the rate, the whole amount of which plaintiff was required and obliged to pay. No facts whatever were presented showing that the carrier rendered greater, better, more difficult or more expensive service to the less favored shipper than to the favored shippers. This being so, the act itself fixes the unjust and unlawful character of the discrimination, and no finding of fact by the Commission is required either by the terms of the act or for the information of the courts.

The question whether rebates had been given and constituted an unjust discrimination, under the particular facts shown, was submitted to the jury, and was found against defendant. If there must be a preliminary finding by the Commission, the jury will again have to pass upon the same state of facts when the case comes into court for trial, which would produce the absurdity of a double finding of the same facts before judgment can be given. In such a case as the present, where no doubtful practice has been shown, but only the giving of rebates to certain shippers, such a rule could only result in delaying the application of the legal remedy, and perhaps (if certain recent findings of the Commission are sustained) of limiting the amount recoverable in damages to a period of two years before complaint filed.

1. WERE THE LOWER RATES CHARGED BY THE PLAINTIFF IN ERROR ON CONTRACT COAL LEGALLY INJURIOUS TO THE DEFENDANT IN ERROR IN A SENSE WHICH ENTITLED IT TO MAINTAIN AN ACTION UNDER SECTION 8 OF THE INTERSTATE COMMERCE ACT. (Defendant's Brief, p. 33.)

The contention made for the defendant under this head is that, in an action to recover damages for unlawful discrimination under Section 2 of the Act, it is not enough for plaintiff to show a disparity in charges to his prejudice, by charging others less than published rates while collecting the published rates from plaintiff, and the amount of such disparity, but that plaintiff must go further and show that it was actually pecuniarily damaged otherwise than by the excess charge, to a stated amount, by reason of such disparity of charge.

To require such proof would be to practically obviate the first great object of the Act, which was to prevent unjust discrimination by carriers among shippers. It would be to require of the complaining shipper a kind of proof which he would find it almost impossible to furnish. He might see very well that preference in rates to rival shippers was depriving him of desirable contracts, narrowing the scope of his business and diminishing his profits, but it would be beyond his power, except in very exceptional cases, to prove that he would have gotten a certain valuable contract, which otherwise went to a favored shipper, or would have made a certain definite profit in a certain month or year. At the same time, it is idle to say that a shipper is not injured by being charged a *higher than the legal rate* of charge.

The English Courts, in construing Section 90 of the Railway Clauses Consolidation Act of 1845 (the

Act upon which Section 2 of the Interstate Commerce Act was modeled, and to which it is essentially analogous) held, that, where there was an inequality in rates, in violation of the provisions of the Act, each shipper was entitled to demand the same terms as the most favored, and to receive the lowest rate charged any other shipper for like service; and that any excess in the rate charged him over the rate charged any other shipper similarly situated, must be regarded as exacted from him in violation of law, and, as such, would be recoverable in damages.

This rule was upheld in a number of English cases decided before 1887, and was settled law in England when Section 2 of the Interstate Commerce Act was first enacted.

Thus, in *Great Western Ry. Co. vs. Sutton*, L. R. 4 H. L. 226, the court said, per Blackburn, J. (p. 238):

“I think it appears from the preamble of the 90th Section of the *Railways Clauses Consolidation Act*, 1845, that the Legislature was of opinion that the changed state of things arising from the general use of railways made it expedient to impose an obligation on railway companies acting as carriers beyond what is imposed on a carrier at common law. And if this be borne in mind, I think the construction of the proviso for equality is clear, and is, that the defendants may, subject to the limitations in their special acts, charge what they think fit, but not more to one person than they, during the same time, charge to others under the same circumstances. And I think it follows from this that if the defendants do charge more to one person than they, during the same time, charge to others, the charge is, by virtue of the statute, extortionate. And I think that the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the statute on railway companies acting as carriers on their

line must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the Common Law on ordinary carriers as being more than was reasonable.

“The mode of establishing that the demand is extortionate differs in the two cases. Where it is sought to prove that the charge is unreasonable, and therefore extortionate, the fact that another was charged less is only material as evidence for the jury tending to prove that the reasonable charge was the smaller one. When it is sought to shew that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not, it is enough to shew that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances. One single act of charging a person less on one particular occasion would not, I think, make the higher charge to all others extortionate during all that day, or week, or month, or whatever the period might be. I think it would be necessary to shew that there was a practice of carrying for some person or class of persons at the lower rate. But a single instance would be evidence to prove this practice; and if followed up by shewing that the smaller charge was repeatedly made at intervals over a period of time, the jurors would, in the absence of explanation, be justified in drawing, and would probably draw, the inference that the company during the period carried for others at that lower rate, and consequently that the higher charge was extortionate as being beyond the statutable limit of equality.”

So, also, in *London & N. W. Ry. Co. vs. Evershed*, 3 App. Cas. 1029, an inequality of charge was made by a railway company, by means of free cartage to certain brewers, while others were charged cartage. One

of the latter class, after paying the full rate for a number of years, discovered the difference in charge and demanded repayment. He then brought suit for damages, claiming to recover the overcharge. In affirming judgment for plaintiff, the Lord Chancellor said (p. 1035):

“The one right, to my mind, the clear and undoubted right, of a public trader is to see that he is receiving from a railway company equal treatment with other traders of the same kind doing the same business and supplying the same traffic. In my opinion that is not the case with regard to this plaintiff, and therefore I think he is entitled to recover the moneys he has paid under protest.”

In the same case Lord Hatherley said (p. 1036):

“It was argued that the Plaintiff in the present case, *Mr. Evershed*, could have no reason to complain because they were bountiful to others whilst to him they made this charge, and still less (it was said) could he recover from them what he has so paid as money obtained from him unduly, and for which he could sue in an action for money had and received. I apprehend that the real state of the facts appears clearly from the Special Case, and however the word ‘gratuitously’ may be applied there (and it seems to be applied not perhaps unnaturally) the result is this, that in making the total charge for the total work, done in exactly the same circumstances in every respect, except that the one class of people happen to be near to a rival railway, and therefore might be tempted by some offer to hand over their business to that railway, the one brewer is charged 1s. 9d. more than the others. If that be so, surely he has the right to sue for it, in whatever form the arrangement may have been made as between the company and the others, the favored individuals, because that arrangement comes in effect simply to this: We charge other peo-

ple a lower sum of money, and we charge you a higher sum of money. But according to the strict meaning of the Acts of Parliament, as interpreted by the decisions, from the very moment that the company charges A. a given sum, when B. another person (a mere stranger up to that time, if you will), comes to the company to have the same services rendered under the same circumstances, he cannot be charged one farthing more than has been charged to A.; he can only be charged precisely what the Act authorizes the company to charge, namely, that which has been charged to others, and the moment the directors take on themselves to charge less to another person, they must charge less to him too. The charge must be the same to all for the same services, performed in the same manner, for carrying the goods for the same distance, and for similar services rendered in every other way; it not being, a case of a wholesale charge compared with a retail charge and the like, which would be a difference of circumstances, and has been decided to be an essential difference."

The ruling of the English Courts in construing Section 90 of the English Act, prior to the passage of Section 2 of the Interstate Commerce Act, are authority in construing that section. Thus, in *McDonald vs. Hovey*, 110 U. S. 628, this court said:

"It is a received canon of construction, acquiesced in by this court:

'That where English statutes, such, for instance, as the Statute of Frauds and the Statute of Limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority.'

Pennock vs. Dialogue, 2 Pet. 1, 18; Smith's Com-

mentaries on Stat. & Const. Law, §634; Sedgwick on Construction of Stat. and Const. Law, 363."

In *Interstate Commerce Commission vs. B. & O. R. Co.*, 145 U. S. 263, this court said (p. 284):

"These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. But so far as relates to the question of 'undue preference,' it may be presumed that Congress, in adopting the language of the English act, had in mind the constructions given to these words by the English courts, and intended to incorporate them into the statute."

And in *Interstate Commerce Comm. vs. Delaware, L. & W. R.*, 220 U. S. 235, the court said (p. 253):

"It is not open to question that the provisions of Section 2 of the act to regulate commerce was substantially taken from Section 90 of the English Railway Clauses Consolidation Act of 1845, known as the Equality Clause, *Texas & Pac. Railway v. Interstate Com. Comm.* 162 U. S. 197, 222. Certain also is it that at the time of the passage of the act to regulate commerce that clause in the English act had been construed as only embracing circumstances concerning the carriage of the goods and not the person of the sender, or, in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated. It was therefore settled in England that the clause forbade the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others. *Great Western R. Co. vs. Sutton*, 1869—L. R. 4 H. L. 226; *Evershed v. London & N. W. Ry. Co.*, 1878—3 App. Cas. 1029; and *Denaby Main Colliery Co. v.*

Manchester &c. Ry. Co., 1885—11 App. Cas. 97. And it may not be doubted that the settled meaning which was affixed to the English Equality Clause at the time of the adoption of the act to regulate commerce applies in construing the second section of that act, certainly to the extent that its interpretation is involved in the matter before us. *Wight v. United States*, 167 U. S. 512; *Interstate Commerce Commission v. Alabama M. R. Co.*, 168 U. S., 144, 166."

The English rule was stated with approval by this Court in *Interstate Commerce Comm. v. B. & O. R. Co.*, 145 U. S. 263, where the Court said (p. 276):

"The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. * * * We agree, however, with the plaintiff in its contention that a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination or an unreasonable preference under sections 2 and 3. As was said by Mr. Justice Blackburn in *Great Western Railway Co. v. Sutton*, L. R. 4 H. L. 226, 239: 'When it is sought to show that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances.' " (Italics ours.)

The case of *Parsons v. Chicago & N. W. Ry. Co.*,

167 U. S. 447, is cited by plaintiff in error in support of its contention, but a reference to the opinion of Mr. Justice Brewer filed in that case shows that the court expressly held that, plaintiff would have been entitled to recover the excess rate charged upon any goods actually shipped by him, and that he was denied compensation because he was not a shipper at all. The language of the court (directly following and forming part of the same paragraph with the words quoted in Defendant's Brief, p. 34) is as follows:

"If he had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates. He did not ship to New York and yet seeks to recover the extra sum he might have been charged if he had shipped. Penalties are not recoverable on mere possibilities."

The recent cases, before the Commission, of *Anaconda Copper Mining Co. v. C. & E. R. Co.* and *International Salt Co. v. Pa. R. Co.*, cited by defendant (Defendant's Brief, pp. 41, 44), so far as they conflict with the principle laid down by the English and American courts, as above stated, are believed to be wrong in principle. In the first of the cases cited, a proceeding is pending before the Commerce Court to require the Commission to take up the matter anew and make a proper award of damages. Neither of those cases, however, turned upon facts similar to those in the present proceeding. In the first case, the facts showed that there was no competition among the particular shippers, as the case was one of two different published rates on coke, according to the use for which coke was intended, and complainant was not in business competition with the iron blast furnaces to which the lower rate was charged. In the last

named case, damages were refused on the ground that the complainant had itself benefited by the preferential rate, and was in no position, therefore, to recover damages.

The language quoted by defendant from *Boyle and Waghorn* (Defendant's Brief, p. 39) is not a statement of the "general rule which has been established under the English statutes," but is a discussion of the English Railway and Canal Traffic Act of 1854, an act providing primarily for the giving of reasonable facilities of transportation by carriers and enforceable by a very limited and special proceeding by injunction. Section 2 of this act (which has no analogy whatever to Section 2 of the Interstate Commerce Act) provides, *inter alia*, that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever."

It was with reference to this provision, drawn in the alternative and to the meaning of words used in connection with this one particular act, that the language quoted was used by *Boyle & Waghorn*. Viewed in this light, it takes on quite a different aspect from that suggested by defendant's brief. At Vol. I, page 152, of *Boyle & Waghorn*, where the English Act of 1890 is being discussed, the correct rule of damages is stated, as follows:

"The 'packed parcels' question went to the House of Lords in respect of a claim of £961 for overcharges (Sutton, 318). It was contended that 'the circumstances were not the same' when the

company were carrying goods for private trading firms and when carrying for competing carriers.

"The opinions of the judges were asked (mainly upon the point whether an action lay for overcharges), and their almost unanimous answer (Bramwell, J., alone dissented) was to the effect that the 'circumstances' of the section were circumstances relating to the goods, and to the carriage of them, and not to the trade or position of the consignor or consignee; also that an action would lie to recover sums charged in excess of the rates allowed to favoured individuals. The opinion was accepted without modification by Earl Cairns and his colleagues in the House of Lords."

In *Manchester &c. Ry. Co. v. Denaby Main Line Colliery Co.*, 11 App. Cas. 97 (Reversing 14 Q. B. D. 209) cited by defendant (Defendant's Brief, pp. 39-40), a number of violations of the Act of 1890 were charged, and the case was referred to an arbitrator, under the terms of the Act, who found that, as to most of the matters alleged as discriminations, the circumstances and conditions of carriage were dissimilar, and declined to award damages as to the discriminations found, on the ground that, "the Court does not say on what quantity of coal or on how much of the defendant's coal carried to Grunsby the excess is to be calculated, and we are unable to see how the quantity is to be fixed."

The "Court of Appeal", confirming the Referee's report, held, that no damages were recoverable, because, while there was a violation of Sect. 90, it did not appear that plaintiff sold any less coal by reason of the allowance to other shippers. This holding was expressly negatived by the Appellate Court (House of Lords), who held that the diversity of charge, *per se*, entitled plaintiff to recover, and further said that they were unable to see the difficulty in assessing damages, and held reversing the Referee's finding as confirmed

by the judgment of the court below, that damages were properly computed by taking the difference between the rate charged plaintiff and the rate charged other parties on like shipments over the same line.

It thus appears that the very point now raised by defendant (that actual injury to plaintiff's business must be shown) was raised in the Denaby case, and decided against defendant's contention.

The rule that the measure of damages for failure to give equal rates to shippers, is the difference between the rates charged to plaintiff and the rates charged favored shippers for like service, has been frequently held in this country, both under the Common Law and under State Statutes.

In *Union Pacific Ry. Co. v. Goodridge*, 149 U. S. 680, an action was brought under a Colorado statute to recover treble damages for unjust discrimination in freight rates by the giving of rebates. The Court entered judgment on a verdict for plaintiff in the amount of three times the excess of the published rate over the rate charged the favored shipper. This Court affirmed the judgment, and, in doing so, recognized that the Colorado statute was similar in scope to Section 2 of the Interstate Commerce Act, saying (p. 690):

"This act was intended to apply to intrastate traffic the same wholesome rules and regulations which Congress two years thereafter applied to commerce between the States, and to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality."

In *Hays v. Pennsylvania Co.*, 12 Fed. 309, exactly the same question of measure of damages for discrimination between shippers was raised: In that case

the plaintiffs were engaged in mining coal at Salineville, Ohio, for sale in the Cleveland market. They were wholly dependent on the defendant for transportation. The regular tariff between those points was \$1.60 per ton, with a rebate of from 30 to 70 cents per ton to persons shipping over 5000 tons during a year; the amount of rebate being graduated according to the quantity shipped. Under this schedule plaintiffs were required to pay higher rates on the coal shipped by them than were exacted from other and rival parties, who shipped larger quantities. The defendant claimed that the discriminations were made in good faith, to stimulate production and increase its tonnage, and were within the discretion confided by law to every common carrier. In an action to recover back the excess in rates paid by plaintiffs, *held*, that such discriminations were illegal, and that plaintiffs were entitled to recover the amount paid by them in excess of the rates accorded to their most favored competitor, with interest thereon.

In *Louisville E. & St. L. Consold. R. Co. v. Wilson*, 132 Ind. 517; s. c. 18 L. R. A. 105, the same rule was applied. In that case the shipper sued to recover back \$2800 of charges alleged to have been paid in excess of the charge made for like services to a favored shipper. And the Court said (p. 109):

“Upon these facts the Court of its own motion as well as at the request of the appellees, instructed the jury substantially that if during seven months of the year 1887 the appellees shipped 353 carloads of cross-ties, in the usual manner, over the appellant’s railroad, and during the same time Dickerson shipped a greater number of carloads under a special contract, which in addition to the contract of affreightment contained other stipulations of advantage to the appellant that the natural and necessary effect of these transactions considered in detail and altogether was a substan-

tial discrimination in favor of Dickerson and against the appellees who were made to pay to the appellant many hundred dollars in excess of that paid by Dickerson for similar services and in excess of the value of all that was done or furnished or to be done or furnished by him under the special contract, then the appellees upon making a demand would be entitled to recover for the excess of freight so paid by them.

"If any objection at all can be urged against these instructions it is, we think, that they are, under the facts in this case, too favorable to the appellant. It is not true that a railroad company, engaged in the business of a common carrier, possesses the same liberty to make contracts for its profit in carrying freight or passengers that a private person engaged in a private business possesses in making contracts in relation to private affairs."

And see

Cook v. Chicago, R. I. & P. R. Co., 81 Iowa, 551; s. c. 9 L. R. A. 764.

Messenger v. Pa. R. Co., 36 N. J. L. 407; 37 N. J. L. 531.

The defendant has sought to minimize the application of the English rule as applied to §90 of the Railway Clauses Consolidation Act, by remarking (Defendant's Brief, p. 40) that

"One of these statutes, which embodies the so-called 'equality clause' (Section 90 of the Act of 1845), as construed by the English Courts, makes a higher rate, where a lower one has been unlawfully extended to shippers, extortionate and consequently excessive, with the result that the one paying the higher rate is consequently entitled to recover the difference between the two rates irrespective of actual damage."

This is a misleading statement of the Act and Section, the language of which is as follows:

“All such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favor of or against any particular company or person traveling upon or using the railway.”

It is clear that the only material differences between the Act of 1890 and Section 2 of the Interstate Commerce Act (which was modeled on it) are, that the latter Act is rather broader in scope, the circumstances and conditions required thereby being “substantially similar” instead of “the same”, and the restriction to shipments “passing only over the same portion of the line of railway” being omitted. The English Act does not in terms, any more than Section 2 of the Interstate Commerce Act, make “a higher rate, where a lower one has been unlawfully extended to shippers, extortionate and consequently excessive.” The courts, however, in interpreting the Act, have held, that, under its provisions, the giving of a lower rate *per se* constitutes an unjust discrimination against shippers charged the higher rate, and entitles all other shippers to the same rate, and that the difference between the two rates becomes, *ipso facto*, as to them, extortionate, and they are entitled to recover the difference from the carrier. This was the established rule in the English Courts when Section 2 was enacted, and is equally applicable to the provisions of that section.

2. DEFENDANT IN ERROR NOT ENTITLED TO RECOVER AS TO ALL ITS SHIPMENTS, AS THE EVIDENCE FAILED TO SHOW THAT THE LOWER RATES APPLICABLE TO CONTRACT COAL WERE SECURED BY ANY SHIPPER ON ALL HIS OR ITS SHIPMENTS. (Defendant's Brief, p. 46).

When the present case was before the Circuit Court of Appeals this contention was made, and was answered as follows, per Buffington, J., 173 Fed. 1 (pp. 6-7):

"The next assignment of error raises the question of the propriety of the court's refusal of defendant's seventh point, which is:

'The plaintiff is not entitled to recover on all its shipments made in any one month or period of time because of the fact that during such time the defendant transported at a lower rate than it charged the plaintiff a portion of the shipments of some other shipper. If such lower rate was not justified, the amount which the plaintiff is entitled to recover is measured by the difference between the rate per ton which it paid on all its shipments during such period and the rate per ton which the other shipper paid on his or its whole volume of shipments during such period. As there is no evidence from which the jury can estimate the rate per ton paid on all their shipments by the shippers, a portion of whose shipments were carried at lower rates than were charged the plaintiff, there is no basis on which to estimate the amount which the plaintiff is entitled to recover, and it is only, therefore, entitled to recover nominal damages'.

This point in effect requested the court to charge, as fixing the measure of recovery, not the lowest rate charged by the railroad to another

shipper, but the general average paid on all shipments made by such shipper. For instance, the railroad contends that, where another shipper's contract coal was charged a less rate than the Mining Company, the recovery was not fixed by the difference between these two rates, but the fixing rate was the average rate paid on all contract coal shipped at the lower rate and all free coal at the higher rate. We think the court was right in denying this point. Whatever may be argued in support of the equity of such a rule, the simple answer is that Congress made no such rule. The purpose of the act is clear, viz., to enforce equality of rate for like service in every case, and the mischief is done when for that service a shipper is charged more than any other shipper is charged for 'any service rendered, or to be rendered, in the transportation of passengers or property.' So long as it charges a lower rate for any shipment, the law is defeated, although on other shipments it may charge the proper rate."

There is nothing in *Manchester &c. R. Co. v. Denaby M. C. Co.*, cited by defendant (Defendant's Brief, p. 50), to support any such rule as that suggested. The ruling in the above case was that the shipper discriminated against could not recover on a mere charge offered to another shipper, but must show that such other shipper actually paid such lower rate, the excess recoverable being the difference between the rate paid by plaintiff and the rate paid by any other shipper or shippers on a like quantity of goods.

The correctness even of this rule is open to some question. It certainly does not carry out to its logical conclusion the rule announced in the *Sutton* and *Evershed* cases. If the carrier is giving a lower rate to a shipper with a five hundred pound contract, and if any other shipper is entitled to demand the same rate, why is not the same rate demandable by a shipper having

a thousand pound contract as to its entire shipment? But such a rule materially differs from that advocated by defendant, which is, that the entire service rendered to the shippers during the period in question should be treated as entireties, and that the damages should be the excess between the average of all rates charged each. As soon as this statement is made, the inequality of its application becomes manifest. By its operation, the larger the total shipments of the favored shipper, the less becomes the carrier's liability. Taking the case of the Berwind-White and the plaintiff companies this becomes apparent. It is probable that the total of plaintiff's shipments was considerably less than 10 per cent. of all shipments by the Berwind-White Company, the magnitude of which Company's shipments appears from the fact that the pier at Harsimus, which was leased by the Berwind-White Company under a provision that at least 35,000 tons of coal monthly (Record, p. 394) should be brought to such pier, was found insufficient to accommodate any other shipments than those of the Berwind-White Company during this very time (Record, p. 338) and moving from this Clearfield District (Record, p. 341) and that the entire coaling of the French Company Trans-Atlantic, The North German-Lloyd, the Hamburg-American Steam Packet Company, and the New York & Cuba S. S. Co., each covering a term of years, was from the Berwind-White Company's shipments during said period (Record, p. 333). Conceding, however, as defendant assumes (Defendant's Brief, p. 49), that the plaintiff's limited shipments equalled 10 per cent. of the great output of the Berwind-White Company, we have a discrimination against plaintiff on every ton of coal shipped by it, by the giving of a reduced rate on a corresponding ton of coal to another ship-

per. But defendant contends, that, as the Berwind-White Company have paid the published full rate on 90 per cent. of their shipments, these should be averaged in, thereby reducing the average lower rate on all shipments carried for the Berwind-White Company. As the Circuit Court of Appeals said, Congress never made any such rule. A discrimination is a discrimination to its full extent, and is not palliated or excused by obedience to the law in other instances. But, apart from this, let us see where the rule suggested leads. Suppose the Berwind-White Company's shipments to double in amount, while the amount of rebates granted them remains the same. The carrier's liability correspondingly diminishes though the discrimination is the same. The larger the shipper, the less the carrier's liability, provided always some moderation be used on the amount of shipments upon which the rebates are allowed; and as the favored shipper's business increases, the rebates may be increased without increasing the carrier's liability. The proposition is plainly destructive of every principle of equality among shippers, and cannot be reasonably entertained.

As was said by the House of Lords, in *Manchester &c. Ry. Co. vs. Denaby M. C. Co.*, cited by defendant, *supra*:

"If a different view were adopted by your lordships, railway companies might, to a very great extent, escape from the provisions of the Act, merely by making allowances to favoured customers on some definite part less (by which I mean substantially, and not only colourably less) than the whole of the goods carried for them. I think (with the Court of Appeal) that there would be very great difficulty, if the principle of overcharge were rejected, in finding any other remedy by way of damages applicable to such a case."

It is unnecessary to say more on this branch of the subject, except that there is no hardship involved in the position of the defendant. The evidence in the case shows clearly that defendant had been engaged, for years before the date from which these damages are assessed, in the illegal practice of rebating to shippers, making such rebates in unequal amounts according as it favored or did not favor the particular shipper. After it had published a rate, and *prima facie* discontinued such practice, it preferred to continue giving rebates to a number of theretofore especially favored shippers. It was under no necessity to do so, and was presumably consulting its own interests when it did. The discrimination resulting is clear, and the injustice of such discrimination, in the face of the published rate, cannot be denied. There is no reason why the carrier should escape the penalty for its voluntary act, and no reason why the penalty should not be directly assessable, according to the rule long in force in such cases, in the difference between the amount charged the less-favored and the favored shipper.

3. SERVICE RENDERED BY PLAINTIFF IN ERROR IN TRANSPORTATION OF COAL ORIGINATING ON HUNTINGDON AND BROAD TOP RAILROAD NOT A LIKE SERVICE TO THAT WHICH IT RENDERED IN TRANSPORTING COAL WHICH ORIGINATED ON ITS OWN LINES. (Defendant's Brief, p. 55.)

The defendant advances another objection to a part of the judgment in plaintiff's favor, on the ground that certain of plaintiff's shipments originated upon the line of the Huntingdon & Broad Top Railroad. The

facts in connection with this contention may be stated somewhat more particularly, as the question was one which the Court submitted to the jury.

The Huntingdon & Broad Top Railroad is a small carrier railroad which connects with the Pennsylvania Railroad at Huntingdon, and enters the Clearfield District. The two roads join in publishing the same rates to all mines in the group territory known as the Clearfield District, which rates on coal are the same whether the shipments move from the line of the Pennsylvania Railroad, or of the Huntingdon & Broad Top Railroad.

The plaintiff purchased coal from some mines in the Clearfield District, which was collected at Saxton and shipped from that point direct over the Huntingdon & Broad Top and the Pennsylvania Railroad Company's lines to destination. The arrangements for shipment in every case were made with the Pennsylvania Railroad Company, and the rate charged was the rate established by the Pennsylvania Railroad Company's tariff for shipments from the Clearfield District.

No facts were offered in evidence to show any dissimilarity in circumstances and conditions of carriage between the shipments in question and the shipments from the Clearfield District over the Pennsylvania Railroad alone.

In the lower court a question was raised as to whether the shipments over the Huntingdon & Broad Top and Pennsylvania Railroad lines, originated in the Clearfield District. In regard to this the following colloquy occurred (Record, pp. 372-3):

“THE COURT: I understood there were not any Huntingdon and Broad Top shipments claimed here.

(After a discussion between counsel.)

THE COURT: Gentlemen of the jury, it is con-

tended by the defendant that all the shipments made by the plaintiff during this time, starting from the Huntingdon and Broad Top Railroad, were not in the Clearfield district, and that the evidence does not show that they were in the Clearfield district, and for that reason they were not a like service rendered under substantially similar conditions and circumstances. The plaintiff contends that the shipments on the Huntingdon and Broad Top Railroad and the point of shipments from which the plaintiff shipped its coal on that road, are in the Clearfield district, and that the evidence in this case shows that they were treated as being in the Clearfield district. You will say which is correct. You will say whether the evidence shows it is in the district, or is not in the district. If it is in the district, the shipments from that point would be from the same initial point. If it is not in the district they would not be from the same initial point. It is a matter for you.

MR. GOWEN: I desire to take an exception to the submission to the jury of the question whether there is any evidence that this point was in the Clearfield region.

With your Honor's permission I will hand this computation, which has been prepared by the Audit Company, which takes the shipments made from various points, distinguishing Saxton from the others, so that if the jury should find the Huntingdon and Broad Top shipments were in a different category, the totals may be before them.

(Objected to by plaintiff.)

THE COURT: It is a calculation of counsel. It is like any other counsel's calculation. The Auditor's account can go out with it, and if the jury see fit they can verify it.

MR. GOWEN: I only want the jury to understand that Saxton is the Huntingdon and Broad Top point.

(Objected to by plaintiff.)

THE COURT: Gentlemen of the jury, it is con-

tended by the defendant that Saxton, on the Huntingdon and Broad Top Railroad, is not within the Clearfield district, and they say that there is evidence to establish that. What it is you will recall, if there is such evidence, and if you find that there is evidence to show that it is not within the Clearfield district, then you will say whether or not a shipment from Saxton is a shipment from a point which makes the service a like service rendered under substantially similar conditions and circumstances. If you find that it is not such a service, then, of course, all the shipments that were sent by the plaintiff from Saxton were out of the calculation. The plaintiff says that shipments on the Huntingdon and Broad Top Railroad are within the Clearfield district, that all these letters of transmittal of the defendant trace them as within the Clearfield district, and that one of the witnesses swore that Saxton was in the district. Mr. Wilson said it was in the district. You will say what credit you give to his testimony in view of what the defendant says he swore to at different times. But, at any rate, the plaintiff says that there is evidence here to show from the defendant's own letters that the Huntingdon and Broad Top Railroad is in the Clearfield district. If you find it is within the Clearfield district, then all the shipments from Saxton would be in."

The Court also refused the following point for charge (Record p. 377):

"5. The burden is upon the plaintiff to prove that the service rendered by the defendant in the transportation of the coal for other shippers on which it charged a lower rate was a like service to that which it rendered the plaintiff. As to the plaintiff's shipments which originated on the line of the Huntingdon & Broad Top Railroad, the service performed by the defendant in transporting these shipments was not a like service to that which it performed in transporting shipments ori-

ginating on its own lines, and hence the plaintiff cannot recover as to any of its shipments which originated on the Huntingdon & Broad Top Railroad."

"(Refused. Exception noted for defendant)".

The jury found for plaintiff, including in their verdict the excess rate charged upon the Huntingdon & Broad Top shipments.

In its argument before the Circuit Court of Appeals, the defendant seems to have approached the question of error in the above instruction from two sides. (a) It contended that the evidence showed that the Huntingdon & Broad Top shipments originated outside the Clearfield District, and that the court should have so found: (b) that shipments via the Huntingdon & Broad Top Railroad, *ipso facto*, moved under different circumstances and conditions from those obtaining in shipments over the Pennsylvania Railroad direct.

(a) As to the first of these suggestions, it needs only to be said that the question whether the shipments via the Huntingdon & Broad Top Railroad in this case were shipments from the Clearfield District was submitted to the jury on the facts, and it was by them found affirmatively that such shipments were from the Clearfield District. That there was such evidence in the case, cannot be doubted (Record, pp. 301-2, 313).

The Circuit Court submitted the question without comment upon the statements in evidence, further cautioning the jury to take into consideration the effort made to impeach the testimony of one of plaintiff's witnesses. The Circuit Court of Appeal, in affirming, said (Record p. 423):

"The next question concerns the shipments of

the Mining Company from the Huntingdon & Broad Top Railroad Company. Just what the relation of that road is to the Pennsylvania Railroad, we are not exactly shown either in the proofs or briefs. The proofs do show, however, that the Huntingdon & Broad Top Railroad was within what for freight purposes was known as the Clearfield District, that the rate from it was obtained from the Pennsylvania Railroad and was the general Clearfield District rate and that the Mining Company had no dealings or rate quotations from the Huntingdon & Broad Top Railroad. The portion of the charge which reads: 'It is contended by the defendant that all the shipments made by the plaintiff during this time, starting from the Huntingdon & Broad Top Railroad, were not in the Clearfield District, and for that reason they were not a like service rendered under substantially similar conditions and circumstances. The plaintiff contends that the shipments on the Huntingdon & Broad Top Railroad and the point of shipment from which the plaintiff shipped its coal on that road, are in the Clearfield District, and that the evidence in that case shows that they were treated as being in the Clearfield District. You will say which is correct. You will say whether the evidence shows it is in the district or is not in the district. If it is in the district, the shipments from that point would be from the same initial point. If it is not in the district they would not be from the same initial point. It is a matter for you'—is here assigned for error. We find no error in such language. Whatever may have been its relations with the Broad Top Railroad, the Pennsylvania for freight purposes chose to include it within the Clearfield District, published rates from it as within such district, quoted such rate to the Mining Company and collected the same. By such acts the jury had a right to infer the Broad Top Railroad was, so far as the purposes of this case went, and for freight purposes, a part of the Pennsylvania Railroad sys-

tem. Thus one of the witnesses, speaking of the Broad Top as a separate organization, operated by its own officers, says: 'We didn't know it in freight rates; we didn't ask them for freight rates; we never obtained any freight rates from them. There was no difference in getting a freight rate on Broad Top shipments from Sonman or Clearfield County shipment.' He further said: 'Q. Taking up the matter of the Huntingdon & Broad Top; they were in the Clearfield region? A. Yes; under the tariff rates. Q. And your dealings as to freight were entirely with the Pennsylvania Railroad, that is to say, the Pennsylvania fixed a rate which covered the movement on the Huntingdon & Broad Top? A. Yes. Q. So that was one transaction without regard to the starting point and that was in the Clearfield region—one transaction from start to finish, delivery point, with the Pennsylvania Railroad? A. Yes.' Under these proofs we think the Court was right in submitting the question to the jury whether shipments over the Pennsylvania Railroad originating on the Huntingdon & Broad Top were shipments from the Clearfield District and embraced within the rate established for that district by the Pennsylvania Railroad for by the first section of the act the term 'railroad' is defined to mean 'all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease.' That being established, the shipments of the Mining Company were entitled to the same rates for like shipments the railroad gave any other like shipper in the Clearfield District, although the shipments of the latter did not originate in that particular part of the Clearfield District covered by the Huntingdon & Broad Top. As a matter of policy it may well be that it would be to the advantage of railways to make such an arrangement, but Congress has not left those matters open to them. It has laid down the broad simple principle of like rate for like service and has not authorized the railroad

to make other extrinsic considerations a ground for giving different rates for the same service. For, as was said in *London & Northwestern Ry. Co. vs. Evershed*, 3 Appeal Cases, Law Reports, 1038; 'If equality of charges is to be disregarded under any circumstances that might be made a cloak for making inequalities of charge under unjustifiable circumstances. I do not know whether that was the motive and intention of the Legislature or not, and I do not inquire. What the legislature has clearly said is that the tolls must be charged equally to all persons under the same circumstances. I think that means under similar circumstances as to the goods, not as to the person. I do not think the person comes into the question at all.'"

The finding of the jury we submit is conclusive that shipments of coal from the line of the Huntingdon and Broad Top were shipments from the Clearfield District.

(b) The contention that the mere fact that defendant elected to use a small portion of the Huntingdon & Broad Top Railroad in collecting some of plaintiff's shipments, is a showing of substantially dissimilar circumstances and conditions, so as to allow a difference in rates under the provisions of the Interstate Commerce Act, is of no merit, since both carriers have united in grouping for rate purposes, the mines on the Huntingdon & Broad Top as being in the Clearfield District.

In discussing this matter, it may be noted: *First*, that these shipments are (under the verdict of the jury) shipments from the Pennsylvania Railroad Company's Clearfield District; *second*, that no different conditions of service have been shown, except the bare fact that the shipments moved, for a very short dis-

tance, upon the Huntingdon & Broad Top line. No evidence of any different conditions of carriage were offered, and the effect of the verdict of the jury was a finding that the circumstances and conditions of carriage were the same and that the shipments were from the one District.

The language of the Circuit Court of Appeals, quoted *supra*, very well sets forth the initial difficulty of the carrier in making this contention. It had established, presumably for its own convenience, a group district, and had published a rate by which it agreed to move shipments from all mines in such district at said rate. It contracted to move plaintiff's shipments at said rate from any point in such district, the whole district being regarded as one point of origin. The plaintiff had no dealings with the Huntingdon & Broad Top Railroad Co., and was in no way concerned with the questions whether the Pennsylvania Railroad Co. elected to use the track of that railroad, or whether such use was under "contract, agreement or lease".

The substantial similarity of circumstances and conditions required by Section 2 of the Interstate Commerce Act was never intended to serve as a quibble under which carriers could escape the consequences of rebating and like practices. The terms of Section 2 in this respect were made stronger than those of Section 90 of the English Act of 1845, upon which Section 2 was modeled, "substantial similarity" and not identity of circumstances and conditions being required by our Act; and it has long since been decided by the Courts and the Commission that the circumstances and conditions referred to are circumstances and conditions of *carriage*, and not any and every matter which may enter into the business of the carrier, shipper or consignee.

In *Wight v. United States*, 167 U. S. 512, the Court said (p. 518):

"It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

"* * * The phrase 'under substantially similar circumstances and conditions,' * * * as found in section 2, refers to the matter of carriage, and does not include competition."

And in *Interstate Commerce Commission v. Alabama R. Co.*, 168 U. S., 144, the Court said (p. 166):

"As we have shown in the recent case of *Wight v. United States*, 167 U. S. 512, the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; and we there held that the phrase 'under substantially similar circumstances and conditions,' as used in the second section, refers to the matter of carriage, and does not include competition between rival routes."

In *Interstate Commerce Commission v. Delaware L. & W. R.*, 220 U. S. 235, the Court said (p. 253):

"At the time of the passage of the act to regulate commerce that clause in the English act had been construed as only embracing circumstances concerning the carriage of the goods and not the person of the sender, or, in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated. It was

therefore settled in England that the clause forbade the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others. *Great Western R. Co. v. Sutton*, 1869—L. R. 4 H. L. 226; *Evershed v. London & N. W. Ry. Co.*, 1878—3 App. Cas. 1029, and *Denaby Main Colliery Co. v. Manchester &c. Ry. Co.*, 1885—11 App. Cas. 97.”

In *Philadelphia & Reading Ry. Co. vs. Interstate Commerce Commission*, 174 Fed. 687, this same question was raised in connection with a different charge from mines in the same group, the dissimilar circumstances and conditions alleged being that the difference in the quality of the veins mined was such that the plaintiff's coal could pay the higher rate, and still compete with the coal of the favored shippers. The court refused to hold that there was any dissimilarity of circumstances and conditions, and held that the grouping of the mines was conclusive, until changed, of the necessity of a uniform charge from each group to a like destination, the Court saying (p. 691):

“To us it is clear that while a reduction by the railroad of their rates to the Pennsylvania and West Virginia fields was a proper business step, since otherwise the carrier would have had no traffic from those fields, yet it is equally clear that in the face of such reduction of rates to a part of the group the railroad had no legal right to retain the higher rate on the remainder of the group. The fact that the latter did not need the reduction to meet competition was no legal justification to warrant its retention.”

In *Detroit &c. Ry. Co. v. Interstate Commerce Commission*, 74 Fed. 803, cited by defendant (Defendant's Brief, p. 61), the facts were that two points were included in a group rate, at

one of which the railroad company delivered by carts. This was complained of as a discrimination, and the court, while recognizing the obligation of the railroad company to justify the difference in its service, held that it might do so, by showing that the circumstances at the two points were substantially dissimilar, whereby the increased service was properly included under the group rate.

There is nothing in this case, nor in any cases cited by defendant, to sustain the proposition, that, where a railroad company has established a group and published a rate for the same, and has contracted with shippers on the basis of such rate, it can thereafter contend, that, as to a part of the territory covered, the rate was inapplicable because it has elected to use for a few miles the tracks of another railroad company in such region, or can successfully maintain that its use of such tracks constitutes *per se* substantially dissimilar circumstances and conditions of carriage, without any showing of dissimilar facts in regard to the carriage of shipments.

Defendant in its Brief asserts (Defendant's Brief, p. 57) that there was a through rate which the Huntingdon & Broad Top R. Co. permitted the Pennsylvania Railroad Company to quote for it; but what arrangement, if any, defendant had with the Huntingdon & Broad Top R. Co. and under what sort of an agreement the Pennsylvania R. Co. used the tracks of the smaller railroad to collect shipments in the Clearfield District, does not appear, nor is it important. Plaintiff contracted for the Pennsylvania Railroad group rate from such District, and was under no concern as to how the Pennsylvania Railroad Company brought the traffic forward. Nor was the Pennsylvania Railroad Company, having charged the

plaintiff the published group rate, at liberty to charge other shippers a less rate from the same District.

(b) This whole contention is a manifest afterthought on the part of the defendant. That it recognized no special circumstances or conditions to its disadvantage in shipments on the Huntingdon & Broad Top, sufficiently appears from the fact that it moved plaintiff's other shipments from all points in such District at the same tariff rate as the shipments on the Huntingdon & Broad Top, and that it makes no contention that it had any general or regular practice of allowing a rebate to shippers from other points in the Clearfield District to compensate for any less trouble or expense in connection with the use of the Pennsylvania line only. The contention is now made only and solely with the object of defeating or delaying plaintiff's recovery in this suit. There being no regular practice which the Interstate Commerce Commission could condemn or order discontinued, but only a special rebate allowed to certain favored shippers, there is nothing here but a special discrimination between shippers directly assessable in damages in the Circuit Court.

(d) Exhibits A, B, C and D, in this case, (Record, pages 379-387), moreover show that the rate charged the favored shippers for their shipments from Saxton and other points, originating on the Huntingdon & Broad Top Railroad, were just as low as the rates charged the same favored shippers from other points in the District, and were just as unequal, in comparison with the rates charged plaintiff from the same points, as were the rates for shipments moving over the Pennsylvania Railroad alone. In other words, defendant moved shipments for plaintiff over its own line exclusively, and also over its

own line and the Huntingdon & Broad Top, and charged on both the one published tariff rate from the Clearfield District. At the same time it moved shipments for favored shippers both over its own line entirely, and over its own line and the Huntingdon & Broad Top Railroad, and, in both cases, charged a rate less than the tariff rate. This being so, defendant cannot contend that it is excused by the fact that some of the plaintiff's shipments originated on the Huntingdon & Broad Top Railroad, while it appears that some of the favored shipments originated on the same line. Such a contention should not be seriously considered.

The implied suggestion that it has not been shown that shipments were actually moved for favored shippers from the Huntingdon & Broad Top at less than the published rate, (Defendant's Brief, pp. 66-68), is without merit. Exhibits A, B, C and D (Record, pp. 379-388) show the net rate and the lowest rate actually charged the favored shippers on shipments of coal by them during the period from July 29, 1898, to July 1, 1900, inclusive. These statements were made up by the Audit Company of New York from the defendant's books and papers (Exhibits G and H), subjected to examination by plaintiff under order of Court (Record, pp. 115, 143, 272). These records showed allowances for rebates to the favored shippers by the railroad company on coal already shipped. (Testimony of Mr. Rickey, Record, pp. 271, *et seq.*). These statements show that rebates were returned on shipments actually made by the favored shippers from Saxton, which defendant itself identified as "the Huntingdon and Broad Top point" (Record, p. 373), the amount of such rebate being as large as was allowed the same favored shippers on shipments moving entirely on the Pennsylvania Railroad. Such rebates are shown to have

been allowed from Saxton on shipments of the Berwind-White Company, whose president, on the stand, admitted that an appreciable percentage of the shipments of its company were given these rebates (Record, p. 341). This being so, defendant cannot successfully contend that there is nothing to show that shipments were actually moved from the Huntingdon and Broad Top at a lower than the published tariff rate. If rebates were given on coal shipped from Saxton by favored shippers, there had certainly been shipments from Saxton, and the allowance of the rebate was an actual charging of the lower rate, and not a mere offering of such rate. The English case of *Taylor v. Metropolitan Ry. Co.*, cited by defendant (Defendant's Brief, p. 68), decided only that the mere offering of such a rate was not ground for awarding damages to a shipper charged a higher rate. In that case, the rate-book of the defendant carrier showed two published rates for coke, the lower rate being for coke used in brick-making, and the higher for coke used for general heating purposes, and a shipper who had paid the higher rate brought suit for damages. The Court held that the two rates constituted an unlawful discrimination, but, as it did not appear that any shipments had actually been moved for any one at the lower rate, merely warned the carrier of its unlawful character, refusing a judgment for damages.

This has no application, however, to the facts in the present case, where the rebates were returned after the published rate had been charged, and, therefore, after the shipments had moved. That the rebates were actually returned was admitted throughout this case, and their return completed the net charge to the favored shipper.

4. EFFECT OF SALE MADE BY COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, OF CHOSES AND CLAIMS IN ACTION OF THE DEFENDANT-IN-ERROR. (Defendant's Brief, p.69.)

The question here raised was disposed of by the Circuit Court (Record, pp. 139-140) as follows:

"This demurrer, technically speaking, raises the question as to whether whatever right or title Patrick H. Walls took to the claim in suit under the Sheriff's sale was destroyed by reason of the bankruptcy proceedings. This question need not be considered because in our judgment Patrick H. Walls acquired no interest whatever in this claim by virtue of the Sheriff's sale.

The procedure mentioned in the above plea, under which the property was sold, was instituted under the Pennsylvania Act of March 7th, 1870 P. L. 58. This Act authorizes 'the Sheriff' or other officer to levy the amount of the judgment, with interest and costs of suit, on 'any personal, mixed or real property, franchises and rights of such corporation and thereupon proceed and sell the same.' There is nothing in this Act which authorizes the sale of a 'claim for damages' such as is involved in this suit. In fact we do not think this kind of a claim or choses in action can be sold under this proceeding, and we are sustained in this view of the case by the Supreme Court of the State of Pennsylvania in the case of Hogg's Appeal, 88 Pa. St., 195-197. In that case it was urged upon the Court that 'the unpaid subscriptions to the stock of the Company passed to the purchaser at Sheriff's sale by virtue of the sale of the road and its franchises, free from any and all claims that the delinquent subscribers might have against the Company.' The Court, in a *per curiam* opinion, held otherwise, and said, 'The sale of the railroad property and franchises did not pass to the purchaser the debts or mere choses in action due to the company from others'.

“And again, so late as April 9th, 1906, the Supreme Court of the State of Pennsylvania, in an opinion filed by Justice Mestrezat in *Pocono Ice Co. vs. American Ice Co.*, 214 Pa. St. 640, holds that the sale of the property and franchises of a corporation does not dissolve or extinguish the existence of mining, manufacturing and trading companies since the Pennsylvania Act of May 21st, 1881, P. L. 30, which expressly provides that ‘all corporations for mining, manufacturing or trading purposes whose charters may have expired, or may hereafter expire, may bring suit and maintain and defend suits already brought for the protection and possession of their property and the collection of debts and obligations owing to them or any of them, and sell, convey and dispose of their property, and make title therefor as fully and effectually as if the charter had not expired’. The Act authorizes the officers last elected to represent the corporation for such purpose, and declares that its purpose is to enable the corporation ‘to realize and divide their assets and wind up their affairs’. The Court holding the Act applies to corporations whose property and franchises have been sold on execution, and although the property and franchises of the Pocono Company had been sold it existed for the purpose of instituting suit against The American Ice Company to recover damages for breach of contract. The plaintiff did recover the judgment, and it was sustained.

The case in effect, therefore, holds that a claim, such as the one in the suit at bar, did not pass to the purchaser at the Sheriff’s sale of the property and franchises of the International Coal Mining Company on an execution against it. But whether or not the International Coal Mining Company could have maintained this suit after the Sheriff’s sale of its property and franchises on an execution authorized by the Act of May 7th, 1870, as an existing corporation, kept alive by virtue of the Act of May 21st, 1881, as suggested by the de-

cision of the Supreme Court in the *Pocono case vs. American Ice Co.*, *supra*, we need not consider because it has been settled by the State Court. This Court has held that the International Coal Mining Company was not dissolved by the Sheriff's sale, and on the involuntary petition properly adjudged a bankrupt. In *International Coal Mining Company*, 143 Fed. Rep. 665 this decision has been affirmed by the Circuit Court of Appeals in this District in the case of *Cresson & Clearfield Coal and Coke Co. vs. Stauffer*, 148 Fed. Rep. 981. Edward D. McLoughlin, trustee in bankruptcy, has, with leave of Court, intervened and is the present plaintiff claiming the right to prosecute this suit to judgment.

Following the view taken by the Court of last resort in the State of Pennsylvania, we hold that title to the claim involved in this suit did not pass to Patrick H. Walls by virtue of the Sheriff's sale set forth in the special plea of the defendant, and that the trustee in bankruptcy properly appears as the plaintiff in this case, the demurrer to the replication is overruled."

The Circuit Court of Appeals overruled the same contention, saying (Record, pp. 425-6):

"The next question raised is that the court erred in refusing to admit in evidence an exemplification of a record of the State Court in the case of the Cresson & Clearfield Coal & Coke Company vs. The International Coal Mining Co., for the purpose of showing a judicial sale of the International Coal Mining Company's claim or chose in action which is the subject matter of the present suit. We see no reversible error in such ruling by the court. Whatever might be the effect of such judicial sale, the refusal of the court to admit it as a matter of evidence at the trial was not improper. When this suit was brought the right of action was clearly in the International Coal Mining Company, then and now the legal plaintiff. It is alleged such

right of action was, after action was brought, sold from it by judicial sale. But waiving the question whether this sale which was made on a lien obtained within four months prior to bankruptcy is not void under the law, it is clear the sale would not abate the action: *Thatcher vs. Rockwell*, 105 U. S. 467; *Eyster vs. Graff*, 91 U. S. 521. No contention is now made that the right of action did not pass to the trustee, if it was not previously divested by the alleged judicial sale. When a plaintiff in a pending action becomes bankrupt, such action is not thereby abated: *Hahlo vs. Conn.* 15 *American Bankruptcy Reports* 591, for Section 11 of the Act provides: 'A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.' Accordingly, the trustee in this bankruptcy was here made use plaintiff and the action proceeded. Now it seems at some prior stage the defendant sought to abate the action by virtue of this judicial sale, but the court had not sustained such effort. However that may be, we have in the assignment of error now before us the simple offer of the exemplification in evidence. In that form the question was simply a contest of the plaintiff's and the defendant had no legal right to interject that question into the trial. If admitted, so far as anything disclosed in the offer on which the assignment is based is concerned, it could not have affected the defendant—consequently its rejection constitutes no reversible error."

It is difficult to add anything to what has been said by Judges Holland and Buffington, as above set forth. As defendant has thought the point important enough, however, to be brought up again on this appeal, we may very briefly state the reasons why this contention on the part of defendant is without merit.

(a) **The Sheriff's sale did not pass title to the present Cause of Action.**

The exemplification offered in evidence was of a judgment entered in a Pennsylvania Common Pleas court against the International Coal Mining Company, at the suit of the Cresson & Clearfield Coal & Coke Company, of a sheriff's sale upon a *fi. fa.* issued under said judgment, and the purchase of all the property and franchises of the Company, on September 29, 1905, by Patrick H. Walls for \$40. The defendant further claimed a release by said Walls to it of the present right of action.

That a sale under a *fi. fa.* does not pass a chose in action has often been held.

Ager vs. Murray, 105 U. S. 126.

Rhoads v. Megonigal, 2 Pa. 39.

McNeely v. Welz, 166 N. Y. 124.

Hoxie v. Bryant, 131 Cal. 85.

Freeman on Executions, 3d Ed., Sect. 112.

But it was contended that such a cause of action as the present would pass by a sale under a special *fi. fa.* issued under the Pennsylvania Act of April 7, 1870 (P. L. 58). This contention was negatived by the Circuit Court.

That a sale of the property and franchises of a corporation at sheriff's sale does not deprive the corporation of the right to recover thereafter on an inchoate cause of action was held in *Pocono Ice Co. vs. American Ice Co.*, 214 Pa. 640. In that case the property, rights and franchises of a corporation were sold at sheriff's sale under the Act of 1870. Thereafter, in a suit previously brought by the corporation to recover on a prior cause of action, the defendant contended that the corporation was put out of existence by the sheriff's

sale, and that no recovery could be had. *Held*, that the corporation was continued, under the Pennsylvania Act of May 28, 1881 (P. L. 30), to enable it to prosecute pending suits, the Court saying: (p. 647)

“It is equally apparent, we think, that the act was intended to apply to all trading corporations whose business had ceased or terminated for any cause whatever, and was not confined to corporations whose charters had expired by express limitation. Why, it may be asked, should the legislature have enacted a remedy for the stockholders and creditors of a trading corporation whose charter had expired by limitation and not of a corporation whose charter rights had been extinguished by any other means? The evil was the same in both cases. So far as such interested parties are concerned the effect was the same, whether the corporation had expired by limitation or its property and franchises had been sold under execution. If this statute is not operative in the latter class of cases, the large sum due the plaintiff corporation, involved in this suit, and any other claims it may have against solvent parties, will be retained by the debtors, whereas they could have been collected if the plaintiff corporation had been dissolved by the expiration of its charter. The necessity and reason for the protection of the stockholders and creditors are the same in both cases, of which the legislature was duly aware. The manifest purpose of the Act was to afford a remedy in all cases, supposed not to exist at common law, where the life of a trading corporation expired or came to an end by any means whatever, in order that the parties interested might avail themselves of its assets. The statute is remedial and, therefore, is to be extended to cases in equal mischief.”

It is evident that the Court did not entertain the idea that the corporation's right of action had passed at the sheriff's sale.

In *Hogg's Appeal*, 88 Pa. 195, a railroad was sold, and its property distributed under the Act of 1870. On appeal from an order refusing distribution to a creditor against whom the company held an unpaid stock subscription, the Court said: (p. 197)

“The sale of the railroad property and franchises did not pass to the purchaser the debts or mere choses in action due to the company from others. As between the company and a subscriber to stock, the subscription is a debt collectible by ordinary suit. The distribution was properly made according to the principles stated in *Bayard's Case*, 22 P. F. Smith 453.”

This case is in point. The defendant has attempted to distinguish it upon the ground that the report only shows a sale of a “railroad”. The sale was under the Act of 1870, as conclusively appears by the reference to *Bayard's Appeal*, in which case the Court laid down the rule as to distribution of assets of corporations sold out by the sheriff under the Pennsylvania Act of 1870, and, this being so, it is clearly to be assumed that the sale of the railroad in question passed all the property of the railroad, of whatever character, personal, real or mixed, so far as such property could pass under the provisions of said Act.

The Act of 1870 was designed to close up the business of insolvent corporations and distribute their assets *pro rata* among their creditors. But it was certainly never intended to deprive creditors of their opportunity to recover their just debts by selling out suits at law. It is an old saying that no man willingly buys a lawsuit, and it is clear, that, under such a rule, just claims in large amounts, which have not been reached for trial, will be taken out of the hands of their owners and closed out for little or nothing by the defendants

therein or their agents. The present case strikingly exemplifies the logical result of such a rule. A claim for thousands of dollars, which has since resulted in judgment, is sold for forty dollars, under an outstanding judgment, and, after deducting costs, fifteen dollars is offered to the corporation's creditors, while the defendant turns up with a release from the purchaser, secured (as has been alleged in open court) by turning over to such purchaser's corporation moneys of this plaintiff, in the hands of defendant, who had been made garnishee in the original suit, whereby the judgment debt of the execution creditor at the Sheriff's sale was fully satisfied. Without going into a dispute as to facts, the danger of such a rule is sufficiently manifest.

(b) The Sheriff's sale was avoided by the bankruptcy of the International Coal Mining Company.

If defendant seeks to avoid the force of the above reasoning by claiming that the Act of 1870 is an insolvency act, and passes all the corporate assets of every description, it falls at once upon the other horn of the dilemma. Granting that this is the case, the sheriff's sale was an act of bankruptcy, and was avoided by the bankruptcy of the International Coal Mining Company within four months thereafter.

The Act of 1870 supplied the remedy by sequestration under the Pennsylvania Act of 1836, and its object was "to provide a speedy mode for winding up its affairs for the benefit of all its creditors, instead of subjecting them to the vexation and delay incident to the proceedings by sequestration against a corporation hopelessly insolvent": *Bayard's Appeal*, 72 Pa. 455. In this connection it was held that the distribution of the proceeds of the property sold under such act was among the creditors generally, under the insolvency

acts, and not to creditors according to priority of lien: *Bayard's Appeal, supra*.

A sale under this act brings the corporate existence to an end, except as to lands held in fee, pending suits, and like choses in action.

In the matter of this very sale to Patrick Walls, Judge Gray, in *Cresson &c. Co. vs. Stauffer*, 148 Fed. 981, referring to the petition and amendment *nunc pro tunc* as of Nov. 5, 1905, the date of the filing of the original petition in bankruptcy, said: (p. 983)

"The opinion and conclusion of the court in regard to the proceedings under the special *fi. fa.* issued by the state court, as being in effect the placing under the state law of a receiver or trustee in charge of the bankrupt's property, now sustain the allegation of the amendment, *nunc pro tunc*, that these proceedings were of themselves an act of bankruptcy. The sheriff has taken the place of the sequestrator, and is still required to make equal distribution of the proceeds of sale to all the creditors of the insolvent corporation, in accordance with the requirements of the insolvent law of the State of Pennsylvania."

And again: (p. 984)

"It is, however, strenuously insisted that this act of the board of directors was a nullity, for the reason alleged that, at the time it was made the corporation had ceased to exist, and that therefore, the directors and all other officers were *functi officii*s. It is true, that the law already referred to, provides that the property and franchises of the corporation, sold under this special *fi. fa.*, shall pass to the purchaser, thus, in effect, terminating the existence of the old corporation. If, however, the proceeding by which this property and franchises were sold, was an act of bankruptcy, it was void and of no effect."

In *E. Matthews & Sons Case*, 163 Fed. 127, the facts were, that several months before bankruptcy of a debtor, a judgment creditor had an execution issued and placed in the hands of a sheriff, which was later, and within four months prior to the bankruptcy, returned *nulla bona*, and shortly thereafter a receiver was appointed in supplementary proceedings under the New York statute, who sold certain property, and had the proceeds in his possession at the time of the bankruptcy. *Held*, that, conceding that the judgment creditor had an equitable lien under Code Civ. Proc. N. Y., Sec. 1405, while the execution was in the hands of the sheriff, it was lost when the execution was returned, and the State court receivers' lien did not relate thereto, nor back of his appointment, and that, if the debtor was then insolvent, such lien was avoided by the bankruptcy proceedings under Bankr. Act, July 1, 1898, Sec. 67f, c. 541, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), and the property passed to the trustee.

The case of *In re Bailey*, 144 Fed. 214, cited by defendant (Defendant's Brief, p. 70), has no application here. It is true that, in that case, the District Court held, that, where there had been a Sheriff's sale of property, and the property sold had passed into the actual possession of the purchaser, it could not be recovered by the bankrupt estate by summary proceedings in the bankruptcy court. This case has no application for a number of reasons. *First*, the sale was not an ordinary execution sale, but a sale under what is practically a State Insolvency Act. *Second*: There has never been any actual delivery by the Sheriff to the purchaser; on the contrary the suit, begun before the sale, has been transferred to the trustee and the alleged purchaser has never had any control over it. *Third*: The Court in the above case said, "There is no question

here as to the *bona fides* of the purchaser"; but such a question has been expressly raised in the present case, and has gone by default against defendant herein. *Fourth*: The case decides no more than that a summary proceeding would not lie, the trustee being relegated to a plenary suit to avoid the sale as a preference, under Sect. 60b of the Bankruptcy Act; but, as the present proceeding has never been out of the hands of the bankrupt or its trustee, and is now being prosecuted by the trustee, under the control of the Federal Courts, there is no need of any proceeding by the trustee, summary or otherwise, to recover it, and the question of what might have happened if the property sold had been capable of actual transmission, and had passed, manually or otherwise, by such sale, before the trustee was substituted, is entirely immaterial.

(c) The Trustee in Bankruptcy is lawfully in charge, and is the proper person to continue this suit.

As was said, per Gray, J., in *Cresson &c. Co. v. Stauffer, supra*, the bankruptcy proceeding in this case was properly sustained, whether or not the Pennsylvania Act of 1870 was an act of insolvency. This decision of the Circuit Court of Appeals affirmed the decision of Judge Holland below. The Circuit Court and Circuit Court of Appeals have therefore twice, in this proceeding and in *Cresson &c. Co. v. Stauffer*, sustained the rights of the trustee in bankruptcy. The present suit having been brought in the Federal Court, the trustee in bankruptcy was properly substituted as plaintiff by leave of Court, and properly continues to prosecute the same. The suit was not abated by the bankruptcy, nor by the sheriff's sale, made on an execution issued within four months prior to bankruptcy:

Eyster v. Graff, 91 U. S. 521.

Thatcher v. Rockwell, 105 U. S. 467.

An effort to have the proceeding abated by reason of the sale was made at an early stage of the pleadings, but failed, and a replication put in by plaintiff, alleging that the Patrick Wall sale was fraudulent and void throughout, was permitted to go to judgment by default, and, while the Court afterwards gave defendant leave to renew its application to open the default judgment, it has never done so.

(d) The only way in which the matter now alleged as error came before the Circuit Court of Appeals was under the following assignment (Record, p. 409):

"1. The learned Court erred, subject to exception for defendant, in ruling as follows:

'Counsel for defendant offers in evidence an exemplification of the record of Court of Common Pleas No. 1, in the case of the Cresson and Clearfield Coal and Coke Company vs. The International Coal Mining Company, of June Term, 1901, No. 3588, the same exemplification having been filed of record in this case, for the purpose of showing the sale of the franchises and assets of every character and description, including choses in action and claims in action, of the plaintiff company, under the order of the Court of Common pleas No. 1, which sale was made by the Sheriff of Philadelphia County on September 29th, 1905, and subsequently confirmed by Court of Common Pleas No. 1. (Objected to.)

THE COURT: The objection is sustained for the reason that this Court has decided that this chose in action did not pass by the sale. (Exception noted for defendant.)'"

The Circuit Court of Appeals ruled that there was nothing before them but a refusal of the offer in evidence of an exemplification of the record in another suit between plaintiff and a third party. The suit had been tried on the merits upon the pleas of "Not guilty and Statute of Limitations". The Court very properly said (Record, pp. 42-6):

"The trustee in this bankruptcy was here made use plaintiff and the action proceeded. Now it seems at some prior stage the defendant sought to abate the action by virtue of this judicial sale, but the court had not sustained such effort. However that may be, we have in the assignment of error now before us the simple offer of the exemplification in evidence. In that form the question was simply a contest of the plaintiff's, and the defendant had no legal right to interject that question into the trial. If admitted, so far as anything disclosed in the offer on which the assignment is based is concerned, it could not have affected the defendant. Consequently its rejection constitutes no reversible error."

The defendant seeks to bring this matter before this Court by an enlarged offer (Record, p. 435), which contains more than that offered in the Circuit Court. Such offer, however, goes no further than to show a Sheriff's sale of the property and franchises of plaintiff after suit brought, which sale does not in any way abate the present proceeding or affect the right of the Court to determine the same. This being so, it is immaterial whether the plaintiff or some one else is the proper owner of the chose in action, so far as defendant is concerned, and the assignment is without merit.

There is a further assignment of error, to the refusal of the Circuit Court to enter judgment for defendant upon a demurrer to a replication filed to a special

plea, setting forth this branch of defendant's case. The replication alleged, *inter alia*, that the sale was had in pursuance of certain fraudulent representations and practices on the part of the purchaser at such sale, and the Pennsylvania Railroad Company, defendant herein, and the Circuit Court was clearly under no obligation to overrule it off-hand. The defendant subsequently put in a rejoinder to the replication (Record, p. 140), to which a sur-rejoinder was filed (Record, p. 180), alleging, on newly discovered facts, that defendant was an active party in a fraudulent conspiracy therein set forth, under and in consequence of which the sale was made, and that the whole object and intent of the sale was to permit defendant to escape liability in this very suit. Judgment was entered against defendant by default, for want of a rebutter (Record, p. 184), which judgment has never been opened, and a demurrer subsequently offered to the sur-rejoinder was never before the court. The same allegation had been made, and allowed to go by default in another proceeding in the same Court between the same parties (International C. M. Co. v. Pa. R. Co., April Sessions, 1905, No. 25), and remained at issue in a proceeding between the same parties in the Pennsylvania Courts. The final judgment under this branch of defendant's pleadings was, therefore, the judgment by default for want of a rebutter, and this judgment, having been entered by reason of defendant's own default, was not a matter for appeal. That such judgment remained in force, sufficiently appears from the error assigned thereto below (Record, p. 413, Assignment XIII). If there had been any error in the overruling of the demurrer to the replication, it was waived by the subsequent pleadings of defendant and its final abandonment of this branch of its case. Moreover, the assignment goes only to the

fact of the sale, and contains nothing to show how defendant was injured by the Court's ruling. No more need be said on this subject, as, it is submitted, it has been clearly shown that there was no error in the overruling of the demurrer on the questions of law raised thereby.

5. REFUSAL OF THE TRIAL JUDGE TO GIVE INSTRUCTION REQUESTED RELATIVE TO THE CREDENCE TO BE GIVEN TO EVIDENCE OF THE SECRETARY OF THE DEFENDANT IN ERROR. (Defendant's Brief, p. 82.)

The objection to the refusal of the Court to charge as requested in defendant's eighth point for charge (Record, p. 378), is immaterial. As the objection now stands, it is merely to the Court's refusal to comment upon certain alleged discrepancies in the testimony of J. Chester Wilson, a witness for plaintiff. That such action of the Court did not materially injure the defendant, appears from the following quotations from the Record (p. 372):

THE COURT: I do not think that there is anything at issue in this case that depends on the testimony of Mr. Wilson. If I did I would call attention to the fact that Mr. Wilson has sworn to conditions at different times differently. The fact that this coal was shipped by the plaintiff is established. The schedule of the railroad company is not disputed. Mr. Wilson testified, of course, that consignee paid the freight and returned the balance to him. It makes no difference who would get the advantage, the plaintiff is the proper party to sue. There is no doubt the freight was paid, and there is no dispute here that there was any different amount collected than the schedule rate. It was collected from somebody, and it was either collected from the consignee or the

plaintiff, and whichever it was collected from the plaintiff is the proper party to sue. Mr. Wilson's testimony does not seem to me to be of importance to the finding of any material fact in this case."

And, again, (Record, p. 373), the Court said:

"The plaintiff says that shipments on the Huntingdon and Broad Top Railroad are within the Clearfield District, that all these letters of transmittal of the defendant trace them as within the Clearfield District, and that one of the witnesses swore that Saxton was in the District. Mr. Wilson said it was in the District. You will say what credit you give to his testimony in view of what the defendant says he swore to at different times. But, at any rate, the plaintiff says that there is evidence here to show from the defendant's own letters that the Huntingdon and Broad Top Railroad is in the Clearfield District. If you find it is within the Clearfield District, then all the shipments from Saxton would be in".

It thus appears that the alleged contradictions in Mr. Wilson's testimony were sufficiently called to the attention of the jury. Presumably they were not neglected by counsel for defendant in his argument at the trial. If the refusal to comment upon these alleged contradictions was error, it was at least harmless error.

But, there was no error in the Court's refusal of the point; for, the shipper being entitled to recover, and the discrimination being admitted and its amount fixed, it was entirely immaterial whether or not the consignee paid the freight, or how he paid it. Mr. Wilson's credibility was, therefore, not a matter of importance, so far as this particular evidence was concerned, and the Court would have erred in commenting upon it.

The Circuit Court disposed of the matter as follows (Record, p. 372):

“It makes no difference who would get the advantage, the plaintiff is the proper party to sue. There is no doubt the freight was paid, and there is no dispute here that there was any different amount collected than the schedule rate. It was collected from somebody, and it was either collected from the consignee or the plaintiff, and whichever it was collected from, the plaintiff is the proper party to sue.”

The Circuit Court of Appeals took no notice whatever of the assignment, and it was presumably not pressed before that Court.

It is not conceded, as stated in the proposed point (8), “that the plaintiff itself did not pay the freight”—nor that “Payments of the freights, as the evidence shows, was made by those who purchased the coal from the plaintiff”.

There is no evidence of title in anyone other than the shipper to the shipments in question, and the carrier cannot question the title of the shipper with whom it contracted. Where a shipper sues for any cause of action growing out of the shipments, it does not lie in the mouth of the Railroad Company to put the shipper on proof of ownership in the commodity carried.

The Railroad Company gives the manifest to the shipper—no matter who pays the freight—and hence cannot repudiate this same shipper when he brings suit for damages arising out of the shipment, by claiming that he is not the real owner of the goods carried.

In the case at bar there is no evidence to show that the plaintiff was not the owner of the coal shipped until the time of actual delivery to the consignee.

If the goods had been damaged in transit and the

shipper brought suit, no one would for a moment contend that the Railroad Company could evade payment by claiming that the shipper was not the owner of the goods. If this could be done, the Railroads could raise this question in the trial, and, before the question of damage could be inquired into, there would have to be a trial of false issue, one *not* raised by the pleadings, viz., who was the real owner of the goods carried.

In the case of *Sanbern v. Wright & Cobb Lighterage Co.*, 171 Fed. 449, the Court said (p. 455):

“The respondent claims that no title to the property was shown in the General Trading Company and it has therefore no right to recover under any circumstances. It appears that the goods claimed by it were shipped by that company to which they were given by the Glucose Company to sell. The proceeds were collected by the Trading Company, which accounted to the Glucose Company. The former was the proper party to sue by virtue of its interest in the property, and even if it had been merely a factor, still it was entitled to possession and to maintain the action.”

In *Borda v. Pa. R. Co.*, 141 Pa. 484, quoted by defendant (Defendant's Brief, p. 32), the Court affirmed this same contention. The opinion of the referee, affirmed by the Court below, expressly negatived the proposition that the shipper was not the person entitled to sue, saying (p. 492):

“To this it was replied, that the question was not who owned the coal, but who employed the carrier. The duty to carry impartially is to those who employ the carrier, not to those who own the goods carried. Here the plaintiffs sold in their own names. Their principals were undisclosed. The bills for tolls were made to them in their own names, and paid by them in their own names. The case of *Sandford v. Railroad Co.*, 24 Pa. 378,

and the other express company cases, were relied on to sustain this view."

and concluding (p. 493):

"On the whole, I think that the plaintiffs can recover in this action damages for unjust discrimination on the coal shipped by them as factors, as well as on that owned by them in their own right."

The Supreme Court of Pennsylvania affirmed judgment on the finding of the Referee and the Court below.

In *Louisville, E. & St. L. Consold. R. Co. v. Wilson*, 132 Ind. 517; s. c. 18 L. R. A. 105, where suit was brought to recover freight charged plaintiff in excess of the charge made for like service to a favored shipper, the Court said (p. 108):

"The appellant is in error in its contention that it does not appear by the allegations found in the sixth paragraph of the complaint that any excessive freight was paid. It is alleged that the excess of freight so charged and received by the appellant was \$2,800. It is true that it does not appear by affirmative allegation that it was paid by the appellees, but as they were the shippers, we think such an inference should be made. This paragraph was, perhaps, subject to a motion to make it more specific, but such a defect is not reached by demurrer."

And see:

Northern &c. Co. v. Lindblom, 162 Fed. 250.

Blanchard v. Page, 8 Gray (Mass.) 281.

Lloyd v. Haugh, 223 Pa. 148.

Joseph V. Knox, 3 Campb. 320.

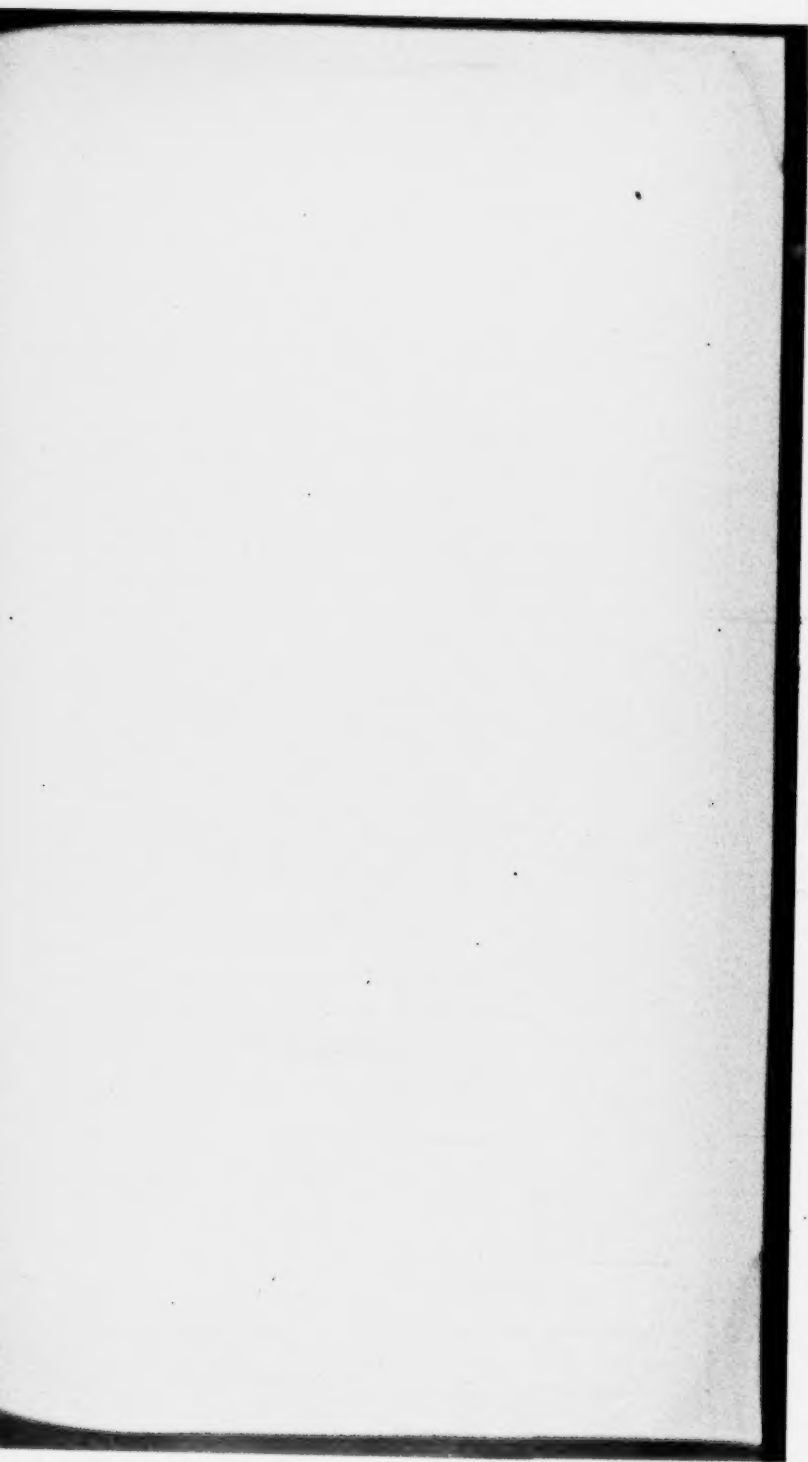
Sargent v. Morris, 3 B. & Ald. 301.

It is not believed that Mr. Wilson was guilty of any mis-statement, certainly not of any intentional mis-

statement, on the trial of this case. The jury were entitled to give credit to his evidence in so far as they, having heard him testify, believed it creditable. If not corroborated by other witnesses, neither was he contradicted by any other witnesses. It cannot be seriously contended that the fact that a witness is not corroborated, or even that he does not answer certain questions so as to satisfy opposing counsel of his veracity, is any real ground for calling upon the jury to disregard his testimony upon a point as to which he was never contradicted by adverse witnesses.

Respectfully submitted,

JAMES W. M. NEWLIN,
WILLIAM A. GLASGOW, JR.,
Counsel for Defendant in Error.



5
No. 14.

October Term, 1911.

IN THE
Supreme Court of the United States.

Wm. Sup. Ct.
FILED.

OCT 3 1911

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error,

vs.

INTERNATIONAL COAL MINING COMPANY,
Defendant in Error.

In Error to the United States Circuit Court of Appeals
for the Third Circuit.

Supplemental Brief for Defendant-in-Error.

JAMES W. M. NEWLIN,
WM. A. GLASGOW, Jr.,
Counsel for Defendant-in-Error.

IN THE
Supreme Court of the United States.

No. 168. October Term, 1911.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,
vs.

INTERNATIONAL COAL MINING COMPANY,
Defendant-in-Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE THIRD CIRCUIT.

SUPPLEMENTAL BRIEF FOR DEFENDANT-
IN-ERROR.

This case was argued, in this Court, at the October Term, 1911, and subsequently, was restored to the Docket for reargument. The points which the court desires to have reargued are not stated, but from what took place at the former argument of this case, it would seem that all the points presented by the plaintiff-in-error were sufficiently answered except one, to wit,—whether, under the Interstate Commerce Act, a shipper who has been charged a greater compensation for service rendered in the transportation of property than was charged to another shipper or shippers for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, and in

violation of Section 2 of the Act, could recover the excess, charge as damages, when the amount paid by such complaining shipper was the amount of the published tariff of rates.

This action was brought for violation of Section 2 of the Act to Regulate Commerce, and the right to bring the action is found in Section 8 and Section 9, and neither of the three Sections (2, 8 and 9) has been amended since the Act to Regulate Commerce was approved, March 4th, 1887, and to deny the right of the plaintiff in this case to recover would be to hold that the plaintiff's undoubted common law right of action for damages, under the circumstances shown in this case, had been taken away by the Act to Regulate Commerce, and that the right, so far as the recovery of damages is concerned, under Section 8 for a violation of Section 2, does not exist if the complaining shipper is not charged more than the published rate, even though in excess of his competitor, and the shipper is deprived by the Act to Regulate Commerce, of the right to recover damages which he would have been entitled to recover at common law, notwithstanding Section 22 of the Act provides: "And nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

A history of the enactment of the Interstate Commerce Act on March 4th, 1887, will demonstrate that it was intended by Congress to give the shipper, charged more than other shippers for the same service, as set forth in Section 2, the right to recover the excess charged him, even though he was charged the published tariff of rates, which the Act, by Section 6, provided should be filed with the Interstate Commerce Commission, and which Section required that the carriers should not "charge, demand, collect or receive from any person or persons a greater or less compen-

sation for the transportation of passengers or property, or for any service in connection therewith, than is specified in such published schedule of rates, fares and charges as may at the time be in force."

On Wednesday, April 14, 1886, Senator Cullom, Chairman of the Senate Committee, reported the bill to regulate Commerce, and said: (See Debates in Forty-ninth Congress, First Session, page 5, compiled by U. H. Painter);

"Section 2.

"The second section strikes at the evil of which the most serious complaint is made, and made justly, by prohibiting and declaring unlawful every variety of personal favoritism or unjust discrimination between persons. Its provisions are confined to that one great evil, and the object of the section is to place all shippers upon an absolute equality as to the rates charged for a like service under substantially similar circumstances. This section specifically prohibits special rates, rebates, draw-backs, or other devices for discriminating between shippers, similarly situated and making like shipments. This particular and almost universal form of unjust discrimination is carefully defined in this section, and in addition to the fine provided for such an offense in section 7 the carrier is made liable for all charges collected from all persons in excess of the lowest rate charged any person for like shipments during the same period. This section is the most important one, and seems to have been made as strong as possible; but if it can be strengthened in any way, I for one would be willing to make it stronger in order to do everything possible to break up the existing system of personal favoritism."

On page 451 Mr. Reagan, Chairman of the Committee in the House, which had the matter in charge said, in part, with reference to Section 2 of the Senate Bill above referred to; (Painter's Debates, page 451):

“The second section of the Senate bill differs from the House bill in providing a measure of damages for its violation, and which is inadequate, by saying that a person charged a higher rate than is charged to any other person may collect the difference between such higher rate and the lowest rate charged upon like shipments during the same period.

“This is no improvement on the common-law remedy which may now be invoked for a like purpose. The common law furnishes no practicable remedy for the abuses of power and the unlawful conduct of the managers of railroads. Claimants for small sums as damages can not as a general rule afford the expense of litigation to establish their claims, while the railroad corporations as a rule protract such litigation to such an extent as to wear out the claimants and defeat the ends of justice.

“Their power to tax the commerce of the country at will enables them to supply the revenues necessary to employ the ablest legal talent of the country to represent them, and also to meet court costs; for these purposes the citizens must use his private means. This is known as a matter of common observation to all of us, and if we would protect the public against such wrongs we must furnish a better remedy than the common law. This is admitted in the able report of the Senate’s committee.

“The House bill provides for the recovery of full damages and requires the court in each case of recovery to tax the corporation with a reasonable fee for the plaintiff’s counsel or attorney fees. This is an improvement of the common-law remedy in that, in case of recovery, it requires the defendant to pay the plaintiff’s reasonable attorney’s fees. The remedy should go further and require the payment of double or treble damages, and I think I shall offer an amendment for that purpose. Besides this, the railway corporations have the power by discriminations and unfriendly

delays to punish any of their patrons who may attempt by litigation or otherwise to prevent their discrimination and injustice."

On page 556 of Painter's Debates, Forty-ninth Congress, First Session, Section 2 of the bill, as passed by the Senate and as introduced in the House, appears as follows:

"Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful; and any common carrier who shall violate the provisions of this section as aforesaid shall be liable to all persons who have been charged a higher rate than was charged any other person or persons for the difference between such higher rate and the lowest rate charged upon like shipments during the same period; or if such lower rate was made on any time contract or understanding, the said common carrier shall be liable to pay a like rebate or drawback to all other shippers over the same route between the same points who have shipped goods during the time that such contract or understanding was in operation."

It will be noted that the first part of Section 2, as passed by the Senate, was the same as Section 2 of the Act at present, but there was also this addition:

“And any common carrier who shall violate the provisions of this Section, as aforesaid, shall be liable to all persons who have been charged a higher rate than was charged to any other person or persons, for the difference between such higher rate and the lowest rate charged upon like shipments during the same period, or if such lower rate was made on any time contract or understanding, the said common carrier shall be liable to pay a like rebate or drawback to all other shippers over the same route between the same points who have shipped goods during the time that such contract or understanding was in operation.”

It appears that the Chairman of the House Committee reported to the House that this measure of damages did not go far enough and the House did not agree to the bill as passed by the Senate. Conference Committees were appointed to confer in regard to the differences in the bills passed by the respective Houses of Congress, and on page 3, Painter's Debates of the Forty-ninth Congress, Second Session, Senator Cullom reported to the Senate on behalf of the Conference Committee, saying:

“Mr. Cullom: Before action on my motion, I desire to make a statement of the changes in the bill. The following is a statement of the changes in the bill as passed by the Senate which have been agreed to and are recommended by the committee of conference.

“Sections 2, 3, and 4 of the Senate bill, prohibiting discriminations, contained provisions in relation to the recovery of damages. These have been stricken out of said sections, and have been grouped together in one section, which is made Section 8 of the committee bill. Except as to this rearrangement, substantially the only change made has been the addition of the provision of the House bill that ‘a reasonable counsel or attorney's fee’ shall be allowed by the court in every case of the recovery of damages. The parts of

said sections which are stricken out in consequence of the rearrangement referred to are all of section 2 after the word 'unlawful,' in line 13, all of section 3 after the word 'business,' in line 18, and lines 23 to 27, both inclusive, in section 4. No other change is made in section 2."

After this conference report, Section 2 and section 8 were adopted and became a part of the Act in identically the same form that they appear today.

It appears that the Senate Bill provided specifically that any person charged a higher rate than was charged to any other person or persons, might recover "the defference between such higher rate and the lowest rate charged upon like shipments during the same period, or if such lower rate was made on any time contract or understanding, the said common carrier shall be liable to pay a like rebate or drawback to all other shippers, etc." And this provision was objected to by the House Committee as not furnishing sufficient measure of damages but provision should be made for recovery of reasonable attorney's fees and the same was stricken out upon the direct statement by Senator Cullom, in making the conference report, "that the *same provisions* have been grouped together in one section, which is made Section 8 of the Committee bill. *Except as to this rearrangement*, substantially the only change made has been the addition of the provision of the House bill, that a reasonable counsel or attorney's fee shall be allowed by the court in every case of the recovery of damages."

It is perfectly clear, therefore, that Congress understood that Section 8 provided for the recovery as damages the excess charged to a shipper over that charged to any other shipper under the circumstances and conditions set forth in Section 2, and this notwithstanding the fact that the same Act required all rates to be published and observed, and in effect that the only

legal rate was that filed and published with the Interstate Commerce Commission.

There has been no amendment of the Act to Regulate Commerce, so far as we can see, which changes this construction which should be put upon the provisions of the Act referred to. It can hardly be held that Congress intended to forbid rebates, and punish the same by criminal proceedings, but took away the remedy which the shipper had at common law and left him, although damaged, without any remedy, and to be satisfied with the punishment of the carrier by criminal proceeding.

At the former argument, the case of *Mitchell Coal & Coke Co. vs. Pennsylvania Railroad Co.*, on petition for certiorari in this court, was referred to. The certiorari was denied by this court, but upon what grounds does not appear, but that case was entirely different from the case here presented to the Court.

Under Section 2 of the Act, when the facts are shown as set forth therein, the law declares that such action by the carrier "is hereby prohibited and declared to be unlawful," and Section 8 gives the right of action to the party charged more than another under the circumstances set forth, he being injured by an "unlawful" charge. There is no question, under the facts set forth in Section 2, for a Commission to pass upon as to whether there was discrimination or not, or whether the acts of the carrier were unlawful, for the Act itself fixes that such action by the carrier is "unlawful." In the case of *Mitchell Coal & Coke Co. vs. Pennsylvania Railroad Co.*, however, the facts were that the petitioner had mines connected with the main line of the Pennsylvania Railroad by branch tracks, which were owned by it, and other shippers had mines, such as Latrobe and Boliver, also connected with the Pennsylvania Railroad by branch tracks owned by them. The Mitchell Coal & Coke Company claimed that

the Pennsylvania Railroad Company allowed others a certain amount out of the published rate, for transporting the coal from the mines over the branch tracks to the line of the Pennsylvania Railroad, and that it refused to make the same allowance to the Mitchell Coal & Coke Company, and as appears on page 5 of the petition for certiorari:

"The Referee found that unlawful discriminations had been made by defendant against the plaintiff, and allowed plaintiff fifteen cents on each ton of coal and coke that it had shipped from all its operations to competitive interstate markets over the lines of the defendant railroad from April 1st, 1897 to May 1st, 1901."

The allowances for this transportation over the branch lines is provided for in the Act to Regulate Commerce, Section 15, as follows:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after a hearing on a complaint, or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this Section."

It appears that for services "connected with such transportation" on the branch lines, the Pennsylvania Railroad Company allowed to the Latrobe and Boliver companies fifteen cents a ton, but declined to make such allowance to the Mitchell Coal & Coke Company, and the whole complaint, notwithstanding references are made by the petitioner to Section 2, must necessarily have been based upon Section 3, which forbids unjust

discrimination and undue preference, and also necessarily some tribunal must pass upon the fact whether this allowance "for service connected with such transportation" created *unjust discrimination* against the petitioner and *undue preference* in favor of the other companies, and as we understand the case, the Court below held that the objection to the jurisdiction of the Court came under the principle announced by this Court in the case of *Texas & Pacific Ry. Co. vs Abilene Cotton Oil Co.*, 204 U. S. 426, and the cases following that decision, to the effect that application must first be made to the Interstate Commerce Commission, which must primarily determine the question of whether there had been unjust discrimination, and this case, we submit, so far as we can see from the decision of the Court below, to which a petition for certiorari was denied, has no bearing upon the present case, where the excess charge to the International Coal Mining Company over others, is declared by law to be "unlawful," the facts and circumstances being shown to be substantially similar. *Mitchell Coal and Coke Co. vs. Pennsylvania R. R. Co.*, 183 Fed. 908.

We, therefore, submit that the judgment of the Circuit Court and Circuit Court of Appeals in this case should be affirmed, and if any other conclusion be reached, it is inevitable that while a shipper may be charged rates in excess of those charged to others at the same time for like service, and sees his competitors on a plane of advantage above that which he can reach, that his common law remedy is destroyed and he can have no relief and must be content, without being put upon a parity with others shipping the same commodity and at the same time.

Respectfully submitted,

JAMES W. M. NEWLIN,
WM. A. GLASGOW, JR.,
Counsel for Defendant-in-Error.

Sept. 1912.

PENNSYLVANIA RAILROAD COMPANY v. INTERNATIONAL COAL MINING COMPANY.

**ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE
THIRD CIRCUIT.**

No. 14. Argued February 27, 28, 1912. Reargued November 4, 1912.—
Decided June 9, 1913.

Under the Act to Regulate Commerce while reasonableness of rates and permissible discriminations based upon differences in conditions are administrative matters for the Commission, the courts have jurisdiction to determine whether differentials in rates can be allowed for the same commodity under similar conditions of traffic, on account of differences in the disposition of the commodity.

A carrier can only charge the published rate for the same article and when collected cannot pay back any part thereof under any pretense, however equitable, to any shipper or to every shipper; and so held that carriers could not after the passage of the Hepburn Act continue to give rebates to shippers pursuant to arrangements made prior to the act on merchandise which the shippers had contracted to sell before that time.

A published tariff, so long as it is in force, has the effect of a statute and is binding alike on carrier and shipper.

While departure from a published tariff is forbidden by the Act to Regulate Commerce and by §§ 7 and 8 thereof the carrier is liable to the person injured for the damages sustained, such damages must be proved and are not to be merely measured by the difference between the published rate paid by the complaining shipper and the lower rate given to a more favored shipper.

While they may be looked at to explain doubtful expressions in a statute, not even formal reports, much less the language of a member of the committee, can be resorted to for the purpose of construing a statute contrary to its plain terms.

While the Act to Regulate Commerce is in many respects highly penal there is no fixed measure of damages in favor of a shipper compelled to pay the published tariff rate while his favored competitors are given a lesser rate by means of rebates. Neither the American nor English decisions are authority for such a rule as to the measure of damages.

The Act to Regulate Commerce imposes on the carrier heavy penalties

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Statement of the Case.

for its violations payable to Government and independent of the amount of rebates paid, and is thus a terror to evil doers; but for private wrongs by which private injury is inflicted the compensation recoverable by the injured shipper is measured by the damages actually sustained and proved.

173 Fed. Rep. 1, reversed.

THE International Coal Mining Company shipped in interstate commerce 190,655 tons of coal over the Pennsylvania Railroad between April 1, 1894, and April 1, 1901. In 1904 it sued the carrier for \$37,268, being the difference between the rates paid by the plaintiff and lower rates resulting from rebates allowed other coal dealers making like shipments over the same road from the same point to the same destination.

Prior to 1899 the carrier collected its open or published rates from all persons shipping coal from the Clearfield District in Pennsylvania. It, however, made a practice of paying rebates, and the plaintiff admits on the face of its complaint that it received rebates of from 10 to 25 cents per ton. It alleges, however, that other consignors received from 15 to 45 cents per ton, and the claim made is "for the further rebate due by the defendant to the plaintiff in excess of the rebates heretofore paid by the defendant to the plaintiff on account of said shipments."

During the trial these claims for additional rebates on shipments prior to 1889 were eliminated by the court.

The question then left in the case involved plaintiff's right to recover on account of rebates having been allowed other companies after April 1, 1899, on what was called "contract coal." The plaintiff had no contracts which overlapped April 1, 1899, and claimed to have learned after January, 1904, of the allowances being made. It thereupon brought this suit for the rebate or difference between the low rate allowed shippers of contract coal and the lawful rate paid by plaintiff on 41,000 tons.

There was a second count in the complaint, alleging

that the plaintiff charged excessive freight for the transportation of plaintiff's coal, in that it charged sums varying from 15 cents per ton to 45 cents per ton in excess of a reasonable charge, and said defendant "is liable to pay said sum of \$37,268.85 with interest thereon from the time of the said overpayments, and this suit is brought to recover the said sums of money."

The plaintiff proved the number of tons in each shipment made by it between April, 1899, and April, 1901, and that it paid the full tariff rate thereon. It also proved that interstate shipments had been made by other coal companies on the same dates from and to the same points and that such companies on their "contract coal" had been paid rebates of 5, 10, 15, 25 or 35 cents per ton, depending upon the difference between the rates when shipment was made and those in force on the dates of the various contracts of sale. It did not appear how many tons had been shipped by any of these companies, nor on how many tons they had been paid 5 cents per ton, or on how many 35 cents per ton, or the intermediate figures. There was evidence that the Berwind-White Company received no rebates on 90 per cent of its shipments, being free coal, but that it did receive rebates on the remaining 10 per cent. which was contract coal.

In addition to evidence as to the payment of such rebates, there was testimony that the Railroad Co. had also made lateral and terminal allowances to some shippers without at the same time making lateral or terminal allowances to the plaintiff. It was claimed that these allowances were unjust discriminations and amounted to the payment of rebates, inasmuch as there was no such dissimilarity in condition between shipments by such companies and those made by the plaintiff as would justify the payment to them without making a similar payment to the plaintiff.

The defendant admitted the difference in treatment, but

claimed that it was justified by the difference in condition. The railroad did not allow the plaintiff for services in hauling loaded and empty cars between the railroad and its nearby mine, but claimed that it paid the Altoona Company 18 cents per ton for services in hauling loaded and empty cars between the mine and the railroad station. The carrier offered evidence to show that the Altoona mine was 4 or 5 miles from the main line, which was reached by a spur track or road having very heavy grades, sharp curves, and three switchbacks over which it was impracticable for the Pennsylvania engines to be safely operated. There was evidence that the amount paid the Altoona Company for such hauling of cars was reasonable.

It was admitted also that the carrier paid the Berwind-White Company, another shipper from the Clearfield District, a terminal charge for furnishing at the New York pier the labor, power and machinery to unload and dump the cars. There was evidence that this was the customary charge allowed for such services in New York harbor.

There was no distinct ruling as to these allowances, but the court evidently treated these payments, not as undue preferences or rebates, but as compensation for transportation services rendered by the shipper in hauling cars to and from the mine and for service on the pier in New York. He refused to charge that the jury could treat these initial and terminal allowances as rebates or as unjust discriminations, or that they could be considered in measuring the damages to which plaintiff might be entitled.

The items prior to April 1, 1899, and these items for initial and terminal allowances having been eliminated, the case was submitted to the jury to determine the amount plaintiff was entitled to recover in consequence of the admitted payment of rebates on "contract coal," no such payments being made to the plaintiff on its shipments of

"free coal." There was some evidence as to the commercial value of being able to ship contract coal at the original freight rate and an estimate of the profits which would have been derived had the same rebates been allowed plaintiff. What, if any, verdict could have been based on this theory was not submitted to the jury, the court charging that where rebates had been allowed other companies, the plaintiff "would be entitled to recover from the Railroad the difference of the returns."

On May 23, 1908, the jury found for the plaintiff a verdict of \$12,013.51. Both parties moved for a new trial and both excepted to the court's refusal to set aside the verdict. 162 Fed. Rep. 996. The Circuit Court of Appeals affirmed the judgment. 173 Fed. Rep. 1. The International Coal Company accepted the decision. But the Pennsylvania Railroad Company brought the case here by writ of error, in which, among many other assignments of error, it complains of the court's refusal to charge that "to entitle the plaintiff to recover, the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was carrying, at the same time, at lower rates, coal shipped by other shippers."

Mr. Francis I. Gowen, with whom *Mr. Frederic D. McKenney* was on the brief, for plaintiff in error:

In the light of the principles established in *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, and *Balt. & Ohio R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481, and of the application made of those principles to the facts in *Robinson v. Baltimore & Ohio R. R. Co.*, 222 U. S. 506, the Circuit Court was not possessed of the requisite jurisdiction to consider and determine the underlying and basic issue involved in the present case.

A court is not the proper tribunal to set aside or annul the tariff rates of a carrier. This power belongs exclusively

to the Interstate Commerce Commission, and it necessarily follows that courts cannot indirectly relieve shippers from the controlling effect of such rates by permitting recoveries either of any portion thereof or, what is equivalent thereto, of damages because of their exaction, until at least the shipper has been relieved from the binding force of such rates by action of the Commission. A tariff rate is binding upon shipper as well as upon carrier. The obligation to observe the same is absolute and is, in effect, statutory in character.

The plaintiff in error in the present case, therefore, was bound to charge and collect, and the defendant in error was bound to pay the rates which were actually charged and paid. Both parties, then, being so bound, an action cannot be maintained by one to recover from the other damages claimed to have been sustained because of the payment demanded and made, when this payment represented a charge which the one party was legally obliged to make and the other one legally obliged to pay. See § 6 of the Interstate Commerce Act.

The Interstate Commerce Commission in many instances has condemned as unlawful, because unreasonable or discriminatory, rates which have been exacted from shippers, while at the same time denying reparation to them. *Anaconda Copper Co. v. C. & E. R. R. Co.*, 19 I. C. C. Rep. 592, and *International Salt Co. v. Penna. R. R. Co.*, 20 I. C. C. Rep. 539.

If the Interstate Commerce Commission has been empowered to determine whether charges or rates of a carrier are unduly discriminatory or unduly preferential, a like power cannot be exercised by the courts. As a matter of law such power is possessed by the Interstate Commerce Commission. *Int. Com. Comm. v. Del., Lack. & West. R. R. Co.*, 220 U. S. 235.

The payment by a carrier to one shipper of an unlawful rebate does not give to another shipper a right of action

under the Interstate Commerce Act to recover like rebates on his shipments.

Under § 8 of Commerce Act which confers, and defines the character of, the right of action which can be asserted by shippers because of violations by carriers of any provisions of the act, that right is limited to the "person or persons injured," and the recovery to the "damages sustained." *Parsons v. Chi. & N. W. Ry. Co.*, 167 U. S. 447.

If a carrier unlawfully refunds to a shipper any part of the tariff rate, it thereby violates the Interstate Commerce Act, but such unlawful act cannot be made the basis of an action at the instance of another shipper, the purpose of which is to compel it to repeat its original violation of the act, in order that such shipper may secure also the benefit of a concession in rates which by the terms of the act the carrier is prohibited from making, and he from receiving. The same is true of cases under the discrimination act of Pennsylvania. See *Hoover v. Penna. R. R. Co.*, 156 Pa. St. 220.

The "amount of injury suffered" is the measure of the single damages to be allowed. But it does not at all follow that the amount of injury suffered is the difference in the rates charged. It might be or it might not be, but in any event it must be a subject of proof, and there was no proof in the case of the actual damage sustained. *Un. Pac. R. R. Co. v. Goodridge*, 149 U. S. 680, distinguished, as that case turned on the statute of Colorado which contained special provisions to the effect that if the carrier made concessions or rebates to shippers it must extend them to all shipping under the same circumstances and conditions.

No damages are recoverable from a carrier which has violated the provisions of the act by charging unequal rates unless the shipper seeking the damages can establish that actual injury resulted to him from such violation. *Anaconda Copper Co. v. C. & E. R. R. Co.*; *Int. Salt Co. v. Penna. R. R. Co.*, *supra*.

If the right of action asserted in the present case is maintainable, it does not extend to all shipments made by the defendant in error in the period in which the unlawful rebates were paid on contract coal, without regard to the consideration that these rebates were not paid on all shipments of the shippers shipping contract coal, but only on the portion thereof which represented contract coal.

This question has not been dealt with or determined by any court in this country. It was considered by the English courts in *Denaby Colliery Co. v. Manchester &c. Ry. Co.*, L. R. 11 App. Cas. 97, and while some of the court were of the opinion that the amount of the overcharges paid by the Colliery Company was to be ascertained with reference to the volume of shipments which had been carried at the lower rate, the application of such a rule will not work out equitable results, nor tend to secure an equality of charge.

A like service, within the meaning of § 2 of the Interstate Commerce Act, is not rendered by a carrier in the transportation from the same district to a common point of shipments which move over a through joint line made up of its own line and that of another carrier, and shipments which move only over the carrier's own line. *Railway Co. v. Osborne*, 52 Fed. Rep. 912; *Tozer v. United States*, 52 Fed. Rep. 917; *Parsons v. Chicago &c. Ry.*, 63 Fed. Rep. 903; *Detroit Ry. Co. v. Int. Com. Comm.*, 74 Fed. Rep. 803; *Loup Colliery Co. v. Virginia Ry.*, 12 I. C. C. Rep. 471; *Cedar Rapids Ry. v. Chicago &c. Ry.*, 13 I. C. C. Rep. 250, 255; *Drinker on Int. Comm. Act*, § 124; *Judson on Int. Comm.*, § 245.

To the same effect are: *Beale & Wyman, Railroad Rate Regulation*, § 943; *Nelson on Int. Com. Comm.*, p. 70; *Barnes on Int. Transp.*, § 428, paragraph D. See also *Griffie v. Railroad*, 2 I. C. C. Rep. 301; *Missouri Ass'n v. M., K. & T. Ry.*, 12 I. C. C. Rep. 483.

A like rule was followed by the English courts, in *Taylor v. Metropolitan Ry. Co.* (1906), L. R. 2 K. B. Div. 55.

A Federal court is not bound to give effect to a judicial sale made by a state court. It is at liberty to ignore the sale if, in its judgment, the state statutes under which the state court proceeded to decree and make the sale did not authorize a sale of the particular property or effect sold.

Mr. William A. Glasgow, Jr., with whom *Mr. James W. M. Newlin* was on the brief, for defendant in error:

The action was brought in the Circuit Court of the United States to recover sums illegally collected by the defendant carrier from the plaintiff shipper, which sums were declared to be illegal by § 2 of the Act to Regulate Commerce.

The defendant violated that section by charging and collecting from the plaintiff a greater compensation for the transportation of coal than it charged and collected from other persons "for doing for . . . them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." Action was brought in the Circuit Court of the United States under § 9 of the act, to recover the damages provided by § 8 for the charging of the sums "declared to be unlawful" by § 2 of the act. The plaintiff did not complain to the Interstate Commerce Commission.

The jury rendered a verdict for an amount equal to the excess charges collected from the plaintiff over and above the charges contemporaneously to other persons for like service. Judgment was entered by the Circuit Court upon the verdict. The Circuit Court of Appeals affirmed the judgment, and the case is now here for review.

230 U. S. Argument for Defendant in Error.

The plaintiff had the right to proceed with its action in the Circuit Court without complaining to the Interstate Commerce Commission in the first instance.

A complaint to the Interstate Commerce Commission in the first instance is only required under the Act to Regulate Commerce where "there is involved a question of administrative discretion." *L. & N. R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70.

When it is shown, as in this case, that § 2 of the act has been violated by the carrier, then there is no "question of administrative discretion" involved, as there was in the *Abilene Cotton Oil Company Case*, 204 U. S. 426, for § 2 of the act itself declares the carrier "guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 2 defines "unjust discrimination," and unlike § 3, relieves the Interstate Commerce Commission from the duty of determining in the exercise of its discretion whether certain acts therein set forth amount to "unjust discrimination," by declaring that unequal charges under similar circumstances is, as a matter of law, "unjust discrimination."

Under § 2, every shipper is entitled "under similar circumstances and conditions" to equality of charges for like service.

When the carrier violated the act by charging plaintiff "greater compensation" for like contemporaneous service than it charged others, then the plaintiff was deprived of its statutory right to equality of charges, by the "unlawful" act of defendant, and by § 8 plaintiff was entitled to recover "the full amount of damages sustained."

The measure of plaintiff's damages was such an amount as would put plaintiff upon the basis of equality of charges assured to it by § 2. See *I. C. C. v. B. & O. R. Co.*, 145 U. S. 263, at page 270, quoting with approval, Mr. Jus-

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tice Blackburn, in *Great Western Ry. Co. v. Sutton*, L. R. 4 H. L. 226, 239, as follows: "When it is sought to show that the charge is extortionate, as being contrary to the statutory obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

In the case of *Great Western Ry. Co. v. Sutton*, *supra*, at p. 238, Mr. Justice Blackburn also said: "And I think it follows from this that if the defendants do charge more to one person than they during the same time charged to others, the charge is by virtue of the statute extortionate."

In enacting § 2 of the Interstate Commerce Act, which was substantially taken from § 90 of the English Railway Clauses Consolidation Act of 1845, Congress intended to incorporate into the statute the construction given to said section by the English courts. *I. C. C. v. B. & O. R. R. Co.*, 145 U. S. 263, at page 284; *I. C. C. v. D., L. & W. R. R. Co.*, 220 U. S. 235, at page 253.

If the excess charge to the plaintiff by the carrier was extortionate, and deprived it of its statutory right, it is submitted that at least the plaintiff is entitled to recover the amount unlawfully extorted from it.

MR. JUSTICE LAMAR, after making the foregoing statement, delivered the opinion of the court.

The International Coal Company operated a mine in the Clearfield District and, with its competitors, shipped between 1890 and 1902 large quantities of coal in interstate commerce. In 1904 it sued the Pennsylvania Railroad Company, basing its action, in part, on the fact that prior to April 1, 1899, the Railroad Company had paid other

shippers rebates of from 15 to 45 cents per ton, while paying plaintiff a rebate of only 10 to 25 cents per ton. Its claim for a sum equal to the difference between the rebate paid to it and that given other shippers was eliminated by the trial judge on the ground that "courts do not sit to measure the difference in degree in violation of the law in favor of one party or the other. The question of the money value that each of them received in their violation of the law will not be looked into, . . . not for the purpose of relieving the defendant, but because the plaintiff is just as culpable . . . and as much a violator of the law as the defendant."

In view of this ruling, the case, as finally submitted to the jury, involved plaintiff's right to recover on account of shipments made after April 1, 1899. On that date the carrier increased the rates and discontinued the payment of rebates, except that for the purpose of saving shippers against loss, it made a difference between what is called "free coal" and "contract coal." Under this practice, where coal had been sold for future delivery, the carrier collected the published tariff rate, but rebated the difference between it and the lower rate in force when the contract of sale had been made. When after April 1, 1899, the plaintiff applied for allowances, its demand was rejected, with the statement that all its contract coal would be protected in the same manner as others in the Clearfield District. The International Coal Company had no overlapping or unfulfilled contracts and claiming that it did not learn of the practice to protect such contracts until, in 1904, it brought this suit. It proved that between April 1, 1899, and April 1, 1901, it had shipped about 40,000 tons on which it had paid the full tariff rate, while other companies shipping from and to the same places at the same time had been allowed on their contract coal rebates of 5, 10, 15, 25 or 35 cents per ton. Plaintiff recovered a verdict.

1. In the court below the Railroad made no question of jurisdiction. But on the argument here it insisted that the case should be remanded with instructions to dismiss the complaint upon the ground that courts had no power to adjudicate the administrative question as to whether a carrier could make a difference in rate between shipments of free and contract coal. It argued that this was a rate-making question and that it was for the Commission, as the rate-regulating body, to determine not only whether a dissimilarity existed, but whether the rates were properly adjusted to meet that dissimilarity.

Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals.

None of these considerations, however, operates to defeat the courts' jurisdiction in the present case. For even if a difference in rates could be made between free and contract coal, none was made in the only way in which it could have been lawfully done. The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected, it was unlawful, under any pretense or for any cause, however equitable or liberal, to pay a part back to one shipper or to

every shipper. The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it had charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, § 2; March 2, 1889, 25 Stat. 855, c. 382, § 6. *Armour Co. v. United States*, 209 U. S. 56, 83.) The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.

In view of this imperative obligation to charge, collect and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid. The rebate being unlawful it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate and refunded a part to a particular class. This departure from the published tariff was forbidden, and § 8 (24 Stat. 382) expressly provided that any carrier doing any act prohibited by the statute should be "liable to the person injured thereby for the full amount of damages sustained in consequence of any such violation, together with reasonable attorneys' fees."

2. But although this suit was brought to enforce a cause of action given by this section to any person injured, it is a noticeable fact that in its pleading the plain-

tiff does not claim to have been damaged and there is neither allegation nor proof that it suffered any injury. It contends, however, that this was not necessary for the reason that, as matter of law, it was entitled to recover as damages the same rate per ton on all plaintiff's shipments as had been rebated any other person, on any of his tonnage, shipped at the same time over the same route. And such a right of action was expressly given in § 2 of the original Bill to Regulate Commerce, which, as it passed the Senate May 12, 1886, did provide that the carrier "shall be liable to all persons who have been charged a higher rate than was charged any other person or persons for the difference between such higher rate and the lowest rate charged upon like shipments during the same period; or if such lower rate was made on any time contract or understanding, the said common carrier shall be liable to pay a like rebate or drawback to all other shippers over the same route between the same points who have shipped goods during the time that such contract or understanding was in operation."

The fact that this provision measuring the amount of recovery by rebate was omitted from the Act, as finally reported to both Houses and passed, is not only significant, but so conclusive against the contention of the plaintiff that it quotes—not the report of the conference committee—but a statement,¹ made by a member of

¹ Mr. Cullom. Before action on my motion, I desire to make a statement of the changes in the bill. The following is a statement of the changes in the bill as passed by the Senate which have been agreed to and are recommended by the committee of conference:

* * * * *

"Sections 2, 3, and 4 of the Senate bill, prohibiting discriminations, contained provisions in relation to the recovery of damages. These have been stricken out of said sections, and have been grouped together in one section, which is made section 8 of the committee bill. Except as to this rearrangement, substantially the only change made has been the addition of the provision of the House bill that 'a reason-

the Senate Conference Committee, to support the present argument that § 8 means the same thing as the omitted clause. But while they may be looked at to explain doubtful expressions, not even formal reports—much less the language of a member of a Committee—can be resorted to for the purpose of construing a statute contrary to its plain terms, or to make identical that which is radically different. *United States v. Freight Association*, 166 U. S. 290, 318; *Maxwell v. Dow*, 176 U. S. 581, 601. Section 2 of the original Senate Bill said nothing about *damages* but in case of rebating gave a shipper a right, in the nature of an action, for a penalty to be measured by the difference between the lawful and the unlawful rate, whether damage resulted or not. That provision was stricken out and § 8 of the Act, as passed by both Houses of Congress and approved by the President, gave a right of action for *damages* and attorneys' fees to "the person injured"—and, of course, to the extent of the injury.

3. There were many provisions in the statute for

able counsel or attorney's fee' shall be allowed by the court in every case of the recovery of damages. The parts of said sections which are stricken out in consequence of the rearrangement referred to are all of section 2 after the word 'unlawful,' in line 13, all of section 3 after the word 'business,' in line 18, and lines 23 to 27, both inclusive, in section 4. No other change is made in section 2." 49 Cong. Rec. 2d Sess., vol. 18, Part I, p. 170.

Section 7 of the House Bill (H. R. 5667) provided that if any carrier should do an act forbidden or omitted to do an act required, or should violate the statute, such carrier should be "held to pay to the person or persons injured the full amount of damages so sustained . . . with reasonable counsel or attorney's fees. . . ." This bill was before the Conference Committee, and the House members, as required by the rules of the House, made a written statement of the action of the Conference, in which it was said (vol. 18, Part II, Cong. Rec., 49th Cong., 2d Sess., pp. 695, 698, 774) that "the eighth section of the substitute bill"—being the eighth section of the present act—"contains the substance of the seventh section of the House Bill in regard to damages and counsel fees but expressed in somewhat different language."

imprisonment and fines. On the civil side the Act provided for compensation—not punishment. Though the Act has been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in *Parsons v. Chicago & N. W. Railway*, 167 U. S. 447, 460, construing this section (8) “before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.” Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what though called damages would really be a penalty, in addition to the penalty payable to the Government. On the contrary, and in answer to the argument that damages might be a cover for rebates, the act of June 18, 1910 (36 Stat. 539, c. 309), provided that where a carrier misquotes a rate it should pay a penalty of \$250, not to the shipper, but to the Government, recoverable by a civil action brought by the United States. 35 Stat. 166. Congressional Record (1910), 7569. The danger that payment of damages for violations of the law might be used as a means of paying rebates under the name of damages is also pointed out by the Commission in 12 I. C. C. 418–421, 423; 14 I. C. C. 82.

4. It is said, however, that it is impossible to prove the damages occasioned one shipper by the payment of rebates to another; and that if the plaintiff is not entitled to recover as damages the same drawback that was paid to its competitor, the statute not only gives no remedy but deprives the plaintiff of a right it had at common law to recover this difference between the lawful and the unlawful rate.

We are cited to no authority which shows that there was any such ancient measure of damages, and no case has been found in which damages were awarded for such discrimination. Indeed, it is exceedingly doubtful whether there was at common law any right of action for any sort

of damages in a case like this, while this statute does give a clear, definite and positive right to recover for unjust discrimination. It thereby either first created the right or removed the doubt as to whether such suit could be brought. The English courts had held that a shipper, who paid a reasonable rate, had no cause of action because the carrier had charged a lower rate to another. *Great Western R. R. v. Sutton*, L. R. 4 H. L. 226, 238. The American decisions were conflicting, though "the weight of authority in this country was in favor of an equality of charge to all persons for similar services." *I. C. C. v. B. & O.*, 145 U. S. 263, 275. But even in those American courts, which held that the rates must not only be reasonable but equal, the doctrine had not been so far developed as to settle what was the measure of damages. *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 309, decided at Circuit, is favorable to plaintiff's contention. But *Union Pacific Ry. v. Goodridge*, 149 U. S. 680; *Louisville E. & St. L. R. R. v. Wilson*, 132 Indiana, 517; *Messenger v. R. R.*, 8 Vroom, 37 N. J. L. 531; *Cook v. Chicago &c. Ry.*, 81 Iowa, 551; *Great Western Ry. v. Sutton*, L. R. 4 H. L. 226; *London &c. Ry. v. Evershed*, 3 App. Cas. 1029; *Denaby v. Manchester &c. Ry.*, 11 App. Cas. 97, relied on by plaintiff, do not support the proposition that damages can be recovered without proof of what pecuniary loss had been suffered as a result of the discrimination.

In one of these cases the suit was brought by a shipper to recover damages because the railroad refused to carry out a contract to discriminate in his favor. In others the court treated the low rate as evidence of what was a reasonable rate and thereupon gave judgment for damages as for an overcharge. *Union Pacific R. R. v. Goodridge*, 149 U. S. 680, 709, involved the construction of the Colorado statute, which did not, as does the Commerce Act, compel the carrier to adhere to published rates, but required the railroad to make the same concessions and

drawbacks to all persons alike, and for a failure to do so made the carrier liable for three times the actual damage sustained or overcharges paid by the party aggrieved. This distinction is also to be noted in the English cases cited. The Act of Parliament did not require the carrier to maintain its published tariff but made the lowest rate the lawful rate. Anything in excess of such lowest rate was extortion and might be recovered in an action at law as for an overcharge. *Denaby v. Manchester Ry.*, L. R. 11 App. Cases, 97, 116. But the English courts make a clear distinction between overcharge and damages, and the same is true under the Commerce Act. For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages but as overcharge, and while one count of the complaint asserted a claim of this nature, the proof did not justify a verdict thereon, for the plaintiff admitted that it had only paid the lawful rates named in the tariff. Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion.

Having paid only the lawful rate plaintiff was not overcharged, though the favored shipper was illegally undercharged. For that violation of law, the carrier was subject to the payment of a fine to the Government and, in addition, was liable for all damages it thereby occasioned, the plaintiff or any other shipper. But under § 8, it was only liable for damages. Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers, and if having paid a rebate of 25 cents a ton to one customer, the carrier in order to escape this suit had made a similar undercharge or rebate to the plaintiff, it would have been criminally liable, even though it may have been done in order to equalize the two companies. For, under the statute, it was not liable to the plaintiff for the amount of the rebate paid on contract coal, but only for the damages such illegal payment

caused the plaintiff. The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered. Whatever they were they could be recovered, because § 8 expressly declares that wherever the carrier did an act prohibited or failed to do any act required, it should be "*liable to the person injured thereby for the full amount of damages sustained in consequence of such violation, . . . together with reasonable attorney's fee.*" In view of this language it becomes necessary to inquire what the evidence shows was the injury inflicted or the damage sustained by the plaintiff in 1901 in consequence of paying rebates in 1901 on contract coal sold in 1899.

5. On various dates between April 1, 1899, and April 1, 1901, the International Company made shipments of coal from the Clearfield District to points in New Jersey, Massachusetts, and New York, its heaviest shipments being to South Amboy, New York Harbor. The aggregate was 40,000 tons, on which the lawful rate was paid. During the same period four other companies shipped to the same points, receiving rebates of from 5 to 35 cents per ton, but the amount of tonnage on which such rebates were paid does not appear. There was no proof of injury—no proof of decrease in business, loss of profits, expense incurred or damage of any sort suffered—the plaintiff claiming that, as matter of law, the damages should be assessed to it on the basis of giving to it the same rate, on all its tonnage, that had been allowed on any contract coal shipped, on the same dates, whether such tonnage was great or small.

Considering the multitude of instances in which discrimination has been practiced by carriers, in ancient and modern times, it is remarkable how little is to be found in decisions or text books which treat of the elements and measure of damages in such cases. In the absence of any

settled rule on the subject, the new question must be determined on general principles.

The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of the pecuniary loss is matter of law, yet this contention is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and every-day instances suggested by testimony in this record. For example:—

If plaintiff and one of the favored companies had both shipped coal to the same market on the same day, the rebate on contract coal may have given an advantage which may have prevented the plaintiff from selling, may have directly caused it expense, or may have diminished or totally destroyed its profits. The plaintiff, under the present statute, in any such case being then entitled to recover the full damages sustained;—

But the plaintiff may have sold at the usual profit all or a part of its 40,000 tons at the regular market price, the purchaser, on his own account, paying freight to the point of delivery. In that event not the shipper but the purchaser, who paid the freight, would have been the person injured, if any damage resulted from giving rebates. To say that seller and buyer, shipper and consignee, could both recover would mean that damages had been awarded to two where only one had suffered;—

Or, to take another example—a favored dealer may have shipped 10,000 tons of coal to the open New York market, receiving thereon a rebate of 35 cents a ton, or \$3,500. The plaintiff at the same time may have shipped 20,000 tons and sold the same at the regular market price.

Under the rule contended for it would then be entitled to 35 cents a ton on 20,000 tons, or \$7,000 as damages. Such a verdict, instead of compensating it for losses sustained, would have given to the plaintiff a profit on the carrier's crime in paying a rebate of \$3,500 and would have made it an advantage to it instead of an injury for the carrier to violate the law.

In order to avoid this anomalous, yet logical, result it is now suggested that, as in the overcharge cases (*Denaby v. Manchester Ry.*, L. R. 11 App. Cases, 97), the plaintiff should only recover a rebate on 10,000 tons, or on the same weight upon which the carrier had allowed a drawback to the competitor. But, while less drastic, this is still an arbitrary measure and ignores the fact that the same anomalous result would follow if there had been, say, ten dealers, each shipping 10,000 tons on the same day. For each of the ten would have been as much entitled as plaintiff to recover \$3,500 on their several shipments of 10,000 tons, and the ten verdicts would aggregate \$35,000, because of the payment of \$3,500 to the favored shipper.

It is said, however, that while there may be no presumption that a shipper was injured because the carrier paid a rebate on a single shipment, or on an occasional shipment, yet it could recover if rebates had been so habitually given as to establish a practice of discrimination. Proof that rebates were customarily paid, would come nearer showing that injury was suffered but would still fall short of proving the extent of the damage, and is not the theory on which the plaintiff proceeds. For it argues that whenever it showed that a lower rate had been charged on contract coal sold in 1899 it was entitled to recover the same rate on shipments made by it to the same place on the same day in 1901, even though there had been no competition in the two sales and without proof that there had been any fall in market prices, diminution in its profits, decrease in its business, or increase in its expenses. It

claimed that it was a mere matter of mathematics and that for every rebate on contract coal, plaintiff was entitled to a like reduction on every ton of its coal without further proof of damage or injury.

6. To adopt such a rule and arbitrarily measure damages by rebates would create a legalized, but endless, chain of departures from the tariff; would extend the effect of the original crime, would destroy the equality and certainty of rates, and, contrary to the statute, would make the carrier liable for damages beyond those inflicted and to persons not injured. The limitation of liability to the persons damaged and to an amount equal to the injury suffered is not out of consideration for the carrier who has violated the statute. On the contrary, the act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law in its measure of fine and punishment is a terror to evil doers. But for the public wrong and for the interference with the equal current of commerce these penalties or fines were made payable to the Government. If by the same act a private injury was inflicted a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment and the state of the market, so that instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of damages sustained,—whatever they might be and whether greater or less than the rate of rebate paid.

7. This conclusion, that the right to recover is limited to the pecuniary loss suffered and proved, is demanded by the language of the statute, the construction put upon it years ago in the *Parsons Case*, and is the view taken in the only other case we find in which this question, under the Act to Regulate Commerce, has been construed. In

Knudsen v. Michigan Central R. R., 148 Fed. Rep. 968, 974, it was said by the Circuit Court of Appeals for the Eighth Circuit that to "support a recovery under this section there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the Government or to corrective or coercive proceedings at the instance of the Commission." A similar principle was applied in *Meeker v. Lehigh Valley R. R.*, 183 Fed. Rep. 548, 550, and in *Central Coal Co. v. Hartman*, 111 Fed. Rep. 96, where the suit was to recover damages caused by a violation of the Anti-trust Act.

Another case, on facts quite like those here involved, is that of *Hoover v. Pennsylvania R. R.*, 156 Pa. St. 220, where the statute, like the Commerce Act, gave the party injured a right of action for damages suffered. In violation of the state law the railroad allowed a manufacturing company a rebate of 20 cents a ton on coal shipped. In a suit for the recovery of damages the trial court charged the jury that the difference between the high and low rate was the measure of recovery. This was reversed, the court saying (p. 244): "The amount of injury suffered is the measure of the single damages to be allowed. But it does not at all follow that the amount of injury suffered is the difference in the rates charged. It might be, or it might not be, but, in any event, it must be a subject of proof. . . . It does not appear that the plaintiffs sold their coal for any less than the current market price, . . . except when they and the other dealers were engaged in a war of prices and sold it far below the actual cost, in a struggle to capture the market."

In view of the express provisions of § 8 of the Act to Regulate Commerce, it was error to refuse to charge that "to entitle the plaintiff to recover, the jury must be satisfied that it sustained some loss or injury due to the fact

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that the defendant was carrying at the same time at lower rates coal shipped by other shippers." The judgment of the Circuit Court of Appeals is reversed and the case remanded to the District Court, with directions to grant a new trial.

Reversed.

MR. JUSTICE PITNEY, dissenting.

The judgment under review sustains a recovery in behalf of a Company shipping coal in interstate commerce, that was charged and paid the lawful published rates of freight, for the difference between the rates thus charged and paid and the less rates customarily allowed to other shippers of coal during the same period and between the same termini. 173 Fed. Rep. 1. The action is based upon §§ 2 and 8 of the Interstate Commerce Act.¹ (24 Stat.

¹ SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons, a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

379, Chap. 104.) The discrimination was accomplished by means of rebates allowed to the other shippers, the excuse for which, or the reason for the discrimination as assigned by the plaintiff in error, was that the coal on which the rebates were allowed was shipped pursuant to contracts of sale made by the favored shippers prior to the putting in force of the published tariff, and made in reliance upon the lower rates then in force. It was proved that during the two years from April 1, 1899, to April 1, 1901, the plaintiff shipped about 40,000 tons, upon which it paid the full tariff rate. The verdict and judgment for \$12,013.51 represent the difference between the freight charges actually paid by the plaintiff and what it would have paid if its coal had been carried on the same terms as the "contract coal."

I agree with the view of the court that the suit was maintainable without any previous action by the Interstate Commerce Commission. I agree also that "even if a difference in rates could be made between free and contract coal, none was made in the only way in which it could have been lawfully done. The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged."

Were the question before us, I should be inclined to say that the Interstate Commerce Act does not admit of a difference in rate for substantially the same transportation service, at the same time and under substantially similar circumstances, based upon the mere fact that the coal of one shipper has been previously sold, under "contract" or otherwise, while the coal of the other shipper has been sold but at a different time, or remains to be sold on its arrival at market. Such a discrimination is in effect based upon the mere ownership of the goods transported, which has recently been condemned by this court. *Interstate Com. Com. v. Del., Lack. & Western R. R.*, 220

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U. S. 235, 252. And see *New Haven R. R. v. Interstate Com. Com.*, 200 U. S. 361, 395; *Armour Packing Co. v. United States*, 209 U. S. 56, 82.

The court, while sustaining the right of action upon the facts presented in this record, reverses the judgment and awards a new trial, on the ground that under the statute there is no presumption of loss on the part of the shipper against whom the discrimination is made, and therefore no established measure of damages in favor of the plaintiff; that § 8 of the Act, in giving a right of action for damages to the injured party, indicated the legislative intent that the responsibility of the carrier to a shipper injured by discrimination in rates should be measured not by the amount of the discrimination, but by the consequential injury accruing to the shipper because of the discrimination, and that without special proof of resulting damage there can be no recovery.

With great respect, I feel constrained to dissent from the view thus taken of the Act of Congress, and from the result to which it leads in this case.

I have not been able to bring myself to accept that view, and, on the contrary, consider that § 2 of the act deals with the prohibited discrimination in rates as a direct pecuniary injury to the disfavored shipper, precisely equivalent in amount to the discrimination; that the Act looks upon the common carrier as a public servant, bound to treat all shippers alike; that it recognizes that the established and published rates, while reasonable in law may be unreasonable in fact, and are proven to be so when the carrier customarily charges less to favored shippers; that it treats the customary allowance to favored shippers of rebates or drawbacks as an admission by the carrier that the higher rate charged to the disfavored shipper is excessive and extortionate in fact by precisely the amount of the rebate; that the disfavored shipper is the "person injured," within the meaning of § 8, and

that the "damages sustained in consequence of any such violation" are, in cases of rate discrimination, at least as great as the amount of the discrimination; that the maintaining of equality in rates being the duty of the public servant as prescribed by the Act, the question whether the shipper, on paying such rates as the law prescribes, charges the freight to his consignees, directly, or indirectly, or not at all, is a matter of no legitimate concern to the public servant. I am convinced further, as the result of a somewhat exhaustive examination of the question, that the view just indicated is not only consistent with the language and evident policy of the Act, viewed in the light of the evils that it was designed to correct, but is consistent with its legislative history, and at the same time accords with the practical construction that has been placed upon it by the Interstate Commerce Commission, and recognized by the courts (including this court) from the time of its enactment; that no other practicable mode of determining the damages, capable of general application, has been suggested for cases of rate discrimination than that which measures the recovery by the amount of the discrimination; and that this was the well-settled measure of damages in such cases, as administered generally in the courts of this country prior to the passage of the Act, and at the same time was the established rule of damages under the Act of Parliament upon which our § 2 was modeled, as already established by repeated decisions of the House of Lords when Congress passed the "Act to Regulate Commerce"; and that the English decisions are cogent evidence of the intent and meaning of Congress, as this court has several times declared.

The precise error attributed to the trial judge is the refusal to charge, as requested, that "To entitle the plaintiff to recover, the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was

carrying at the same time, at lower rates, coal shipped by other shippers."

Since the recovery was based upon a discrimination arising from the payment of rebates to the other shippers on coal shipped by them in fulfillment of contracts made long before, so that the coal upon which the rebates were allowed did not and could not come into direct competition with the plaintiff's coal in the market, it is presumable that there was no consequential injury to the plaintiff attributable to this particular series of rebates, nor any provable injury aside from the fact that more money was exacted from plaintiff than ought to have been exacted on principles of equality. A reversal of the judgment upon the ground adopted by the court is equivalent to a denial of the right of action in this case, and apparently in all cases except in the rare instance where merchandise on which rebates are allowed happens to come into direct market competition with the goods of the complaining shipper.

Not only in the present case, but in most cases, it is impossible to trace actual consequential damages to the particular discrimination, and so the view adopted virtually nullifies the right of action given by § 8 of the Act, so far as concerns persons injured by the discriminations that are prohibited by § 2.

Section 8 says in terms that for anything done by the common carrier, contrary to the prohibition of the Act, it shall be "liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation." Each of the preceding seven sections contains prohibitions, from the violation of which damage may result to the shipper; especially the first four, of which § 1 prohibits unjust and unreasonable charges; § 2 prohibits discriminations in charges, by whatever device accomplished; § 3 prohibits "any undue and unreasonable preference or advantage to any particular

person, etc., in any respect whatsoever;" and requires that reasonably proper and equal facilities be afforded for the interchange of traffic with connecting lines; and § 4 prohibits the charging of greater compensation under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; with a proviso not now pertinent. Certainly, the Act contemplated that shippers against whom these discriminations were practiced, and for whose benefit the entire Act was framed, were to be treated as "persons injured" within the meaning of § 8. And by that section they are to have the "full amount of damages sustained in consequence of any such violation."

The word "damages," according to its customary usage, is at least as properly applicable to the immediate and direct result of imposing higher charges upon one shipper than are customarily charged under similar circumstances and for a like service to other shippers, as it is to the ultimate consequences of such discrimination. The purpose that runs throughout the Act is to require equality of treatment. How can this be so easily accomplished as to treat the damage as being complete when the freight bill is paid, based upon rates that are higher than those charged to other shippers, and to require equality by insisting upon a return of the excess?

Courts everywhere are insistent that remote and consequential and speculative damages shall be excluded from consideration, and that only those directly and proximately resulting from the injury shall be considered. What can be more direct and proximate as damage to a shipper against whom a discrimination is practiced, than the measure of the discrimination as shown by a comparison of freight bills? And what can be more remote and speculative than to enter into considerations arising out of the mode in which the shipper transacts his business,

and to consider whether the particular commodities upon which the discriminatory rates have been imposed were sold under this or that arrangement as between shipper and consignee, and whether the discriminations have resulted in the loss of a particular sale, or of a particular profit, or of a particular customer? Congress, of course, recognized the notorious fact that rate discriminations often rendered it impossible for the disfavored shippers to profitably continue in business. Rate discriminations were prohibited for that reason, amongst others. But Congress, I submit, never intended to impose upon the injured party the impossible task of tracing his ultimate losses to this or to that shipment.

But it is said that whatever view might otherwise be entertained, a particular (and, as I think, a very strained) meaning must be attributed to the word "damages" as used in the Interstate Commerce Act, because of the course of proceedings in Congress that resulted in the enactment of that statute. It is pointed out that § 2 of the original bill provided in terms that in the case of a rate discrimination, the carrier should be liable to the disfavored shipper "for the difference between such higher rate and the lowest rate charged upon like shipments during the same period," with a similar provision respecting rebates and drawbacks, and it is said that because this provision was finally omitted from the Act, the result is not only significant but conclusive evidence of a legislative intent that the "damages" in § 8, so far as discriminatory rates are concerned, are to be measured in some other manner. If § 8 had in terms prescribed any other measure than that which was in the original § 2, or if any other had been then known to the law, I could appreciate the force of the argument. The course of the debate in Congress, as quoted in the opinion, shows that Senator Cullom, who was the chief sponsor for the bill, and a member of the Senate Conference Committee, explained the change as

intended to simply group into one section all the provisions respecting damages that had been contained in three sections. That this was done merely for the purpose of simplification, and with the understanding that the courts would of course apply the proper measure of damages in each case, and would not need Congress to tell them how to do this, clearly appears from Senator Cullom's remarks in explanation of the change. If any other measure of damages in rate discrimination cases had ever been successfully applied, I could concede some force to the reasoning that is based upon this change in the bill during its progress through Congress. But no other measure has been applied, nor does the opinion point out how any other can be.

As a great English judge said,¹ in one of the cases referred to below: "I think that there would be very great difficulty, if the principle of overcharge [meaning a comparison of the rates charged] were rejected, in finding any other remedy by way of damages applicable to such a case." These words were used in the House of Lords in the last of a series of notable cases that finally settled the measure of damages for rate discriminations, under an Act of Parliament that furnished the model for § 2 of our Interstate Commerce Act. That decision was rendered a little more than a year before the passage of our Act. It was undoubtedly known to Senator Cullom (a lawyer by profession), who doubtless also knew that the English courts, in a series of decisions, had adopted the simple solution that the damage was to be measured by the amount of the discrimination. It would, I think, have surprised the learned and distinguished Senator if he had been told that in merely "simplifying" his act he had in effect deprived the disfavored shipper of any and

¹ The Earl of Selborne, formerly Lord Chancellor Selborne, and before that, as Sir Roundell Palmer, counsel for Great Britain at the Geneva Arbitration.

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all remedies in the ordinary case of discrimination, and that too, in a legislative measure whose underlying purpose was to prevent such discriminations, and to add to and extend the remedies already available for securing redress against them.

Prior to the passage of the Act, while the courts of England perhaps did not recognize a right to recover for unjust discriminations unless the rate charged to the complaining party was of itself excessive, the weight of authority in this country was to the contrary, as pointed out by this court in *Interstate Commerce Commission v. B. & O. Railroad*, 145 U. S. 263, 275. And see *Hays v. Pennsylvania Co.* (1882), 12 Fed. Rep. 309, and note; *Samuels v. Louisville & N. R. Co.* (1887), 31 Fed. Rep. 57; *Cook v. Chicago & c. Ry. Co.*, 81 Iowa, 551, 563; *Louisville E. & St. R. R. Co. v. Wilson*, 132 Indiana, 517, 525. The Interstate Commerce Act and the reports and debates in Congress that preceded it are replete with evidence that the Act was intended to give to the shipper against whom discrimination was practiced at least as ample remedy as he would have against exactions that were for any other reason unjust or extortionate.

As a matter of practical construction, the course adopted by the Interstate Commerce Commission in reparation cases is most convincing, not only of what was deemed to be the intent of Congress, but of the fact that no other measure of reparation is practicable saving that which is based on the rate differential. In every case that has arisen, so far as I can discover, the difference in rate has been adopted as the basis of reparation. The cases will be referred to below.

Reference is made in the opinion to the declaration of this court (by Mr. Justice Brewer) in *Parsons v. Chicago & Northwestern Ry.*, 167 U. S. 447, 460, that "before any party can recover under the Act he must show not merely the wrong of the carrier, but that that wrong has in fact

operated to his injury." But the next succeeding words show that this had no such meaning as is now attributed to it. They are: "*If he [the plaintiff] had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates.*"

In short, Parsons had made only "local" shipments (Iowa to Chicago), and had paid the regular published rates therefor. The court held that he was *not injured*, under the particular circumstances of the case, by the failure of the Railway Company to file and publish a certain tariff of *through* rates, applicable not to Chicago shipments, but only to those destined to New York and other points on the Atlantic seaboard. And so the decision was, that he had *no ground of action*. The case has no proper bearing, as an authority, upon the question of the *measure of damages*; but if it is to be employed as an authority at all upon that question, the declaration of the court, that if Parsons had been entitled to recover, his damages would have been measured by the rate differential, ought not to be overlooked.

The fact is that in the *Parsons Case*, while the plaintiff claimed that the carrier was guilty of a discrimination in rates, this court upon an analysis of his petition—upon a demurrer to which the case was determined—found there was no infraction of § 2, because the plaintiff had made no shipments that entitled him to the lower rates of which he complained; so that there was no real basis for his action except the failure of the carrier to publish or file the rates as required by § 6 of the Act. The gist of the complaint was that the carrier, which operated a system of railroad from points in Nebraska through Iowa to Chicago, for the purpose of giving unlawful preference to the shippers of corn and oats in Nebraska, and to unlawfully discriminate against the plaintiffs and other Iowa shippers, put in force from Nebraska points a certain freight tariff on corn and oats in car load lots to Rochelle, Illinois, when

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destined to New York, Boston, Philadelphia, or Baltimore; that this was never circulated or published at any of the stations on defendant's road in Iowa, nor filed with the Interstate Commerce Commission, and its existence was concealed from the knowledge of plaintiff and other shippers on the line of defendant's road in Iowa; that on certain dates named, plaintiff had for shipment at a station in Iowa, certain quantities of corn and oats, and was prevented and deprived, by reason of the matters alleged, of the right to ship the same upon the terms and at the rate thus given to shippers in the State of Nebraska, and was obliged to and did ship his grain over defendant's road from the Iowa point to *Chicago*, at a higher rate than he could have had by taking advantage of the Nebraska schedule if that had been published in Iowa; that this constituted an unlawful preference and discrimination by defendant in favor of the shippers of grain in the State of Nebraska and against the plaintiff as a shipper of grain in the State of Iowa, and the defendant thereby charged, demanded and received a greater compensation for a shorter, than for a longer haul (the longer including the shorter), under substantially similar circumstances. This court (by Mr. Justice Brewer) in dealing with the case, pointed out (p. 455) that the tariff complained of was a joint tariff, and not a tariff of local rates on grain to Rochelle, Illinois, or even to Chicago, which was the eastern limit of the defendant's road; that (p. 457) the pleader had not made out a case on which it could be said that the so-called joint tariff was a mere device under color of which defendant was shipping grain from Nebraska points to Chicago at less rates than were being charged to the nearer points in Iowa; and proceeded to show (p. 459), that plaintiff's argument practically was "that if the tariff had been filed with the Commission, it might have made an order, either general or special, requiring that it be posted at the Iowa stations; that if it had been so posted

he might have examined the rates and might have determined to ship his corn, not to Chicago, but to one of the four eastern points named in such tariff." It was this line of reasoning that led the court to the point of remarking, p. 460, that "The only right of recovery given by the Interstate Commerce Act to the individual is to the '*person or persons injured thereby for full amount of damages sustained in consequence of any of the violations of the provisions of this act.*' So, before any party can recover under the Act he must show, not merely the wrong of the carrier, *but that that wrong has in fact operated to his injury. If he had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates.* He did not ship to New York, and yet seeks to recover the extra sum he might have been charged if he had shipped. Penalties are not recoverable on mere possibilities."

The words italicised (not so in the original) serve, I think, to show that the court was merely negating a recovery on the part of one who might have shipped, but did not ship, and was *not negating, but on the contrary affirming, arguendo, the theory that in the event of the existence of a right of action the measure of damages would have been the difference in rates.*

The opinion herein refers to and undertakes to distinguish the three English cases to which I have already referred—*Great Western Ry. Co. v. Sutton* (1869), L. R. 4 H. L. 226; *London &c. Ry. v. Evershed* (1878), L. R. 3 App. Cas. 1029; and *Denaby Main Colliery Co. v. Manchester &c. Ry. Co.* (1885), L. R. 11 App. Cas. 97—and states that they "do not support the proposition that damages can be recovered without proof of what pecuniary loss had been suffered as a result of the discrimination;" that "the court treated the low rate as evidence of what was a reasonable rate, and thereupon gave judgment for damages as for an overcharge;" and that "the Act of

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Parliament . . . made the lowest rate the lawful rate." With great respect, it seems to me the court has misapprehended the effect of these decisions; perhaps because of not distinguishing two variant statutes there under discussion. There was no Act of Parliament that "made the lowest rate the lawful rate," or in terms declared that any excess over the lowest rate was extortionate, or recoverable in an action at law, as for an overcharge. The remedy that the courts of England accorded to the aggrieved shippers against whom the railway companies had discriminated, was based upon an Act of Parliament that, so far as concerns the measure of damages for an unlawful discrimination, is not to be distinguished from § 2 of the Interstate Commerce Act; indeed, it furnished the model for that section. True, it was a very imperfect model in some respects, and was improved upon by Congress; but it was not departed from in any respect that pertains to the *measure of damages* for favoritism in rate-making. Whatever distinction (if any) the English courts make between "overcharge" and "damages" has arisen with respect to a different statute, and one that furnished the model for § 3 of our Interstate Commerce Act.

Since the English decisions referred to were rendered prior to the adoption of our Act, and afforded a construction of the English acts from which ours was taken, it is of the utmost importance that the terms of the respective Acts of Parliament and the precise grounds of the decisions should be clearly understood.

The first of those acts is the so-called Equality Clause, being § 90 of the Railways Clauses Consolidation Act, 1845, (8 and 9 Vict. c. 20), enacted to consolidate in one act, certain provisions usually inserted in the "special acts" under which railway companies were incorporated. Section 90 is set forth in full in the margin.¹ As will

¹ 90. And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the

be observed, while requiring equality in tolls and rates, so far as it applied, this clause was quite limited with respect to the circumstances under which it applied, being especially confined in its operation by the phrase "passing only over the same portion of the line of railway under the same circumstances." It was in this respect, especially, that Congress improved upon the model. But, so far as this section did apply, the English courts held, in the cases cited in the opinion, and for reasons that will be set forth fully below, that where inequality in rates was shown, the shipper against whom the discrimination was made could recover from the railway company the amount of the discrimination in an action for money had and received, as so much money unlawfully exacted from him, just as by the common law he could recover the excess over a reasonable charge. In the cases cited, or in any others to which my attention has been called, no other measure of damages has been sanctioned, excepting that based upon the amount of the discrimination.

The other act, under which some controversy had arisen in the English courts about the *allowance* of damages

circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole or upon any particular portion of the railway as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all companies or carriages of the same description, and if conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances, and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favor of or against any particular company or person traveling upon or using the railway.

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(but none at all about the *measure* of them), is—"The Railway and Canal Traffic Act, 1854," (17 and 18 Vict. c. 31), of which the second, third and sixth sections are pertinent to the present inquiry. The second prescribes the duty of railway companies to furnish reasonable facilities for traffic, without giving "any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The third section gives to parties complaining of anything done or omitted to be done, in violation of contravention of the Act, a special and extraordinary remedy, by applying "in a summary way, by motion or summons," to certain of the superior courts, or to any judge of such court, authorizing the court or judge to hear and determine the matter complained of, and to issue an injunction or interdict, restraining the company from further continuing such violation of the Act, and to punish disobedience by attachment or other process; also authorizing the court or judge to impose upon the company a heavy daily fine for disobedience of the injunction or interdict; and "Such moneys shall be payable as the court or judge may direct, . . . either to the party complaining, or into court to abide the ultimate decision of the court, or to Her Majesty, and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution," etc. By the sixth section it was enacted as follows: "6. No proceeding shall be taken for any violation or contravention of the above enactments except in the manner herein provided, but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or com-

pany against any railway or canal or railway and canal company under the existing law."

The courts of England have held that because § 2 of this act establishes rights beyond those existing at the common law, and § 3 gives an extraordinary remedy therefor, and § 6 excludes other remedies, there can be no recovery in an ordinary action for damages based upon the mere infringement of the provisions of § 2; but it has been queried whether for a violation of § 2, if such violation involves an unlawful extortion of money for carriage, the ordinary remedies at law for extortion may not be applicable. This question was reserved by the House of Lords in the *Denaby Colliery Case*, 11 App. Cas. 97, 112. But the Court of Appeal having in that case declared (L. R. 14 Q. B. Div. 225) that the remedy by § 6 was exclusive, the same court three years after the enactment of our Interstate Commerce Act (*Rhymney Ry. Co. v. Rhymney Iron Co.*, 25 Q. B. Div. 146, 150), adhered to that view. And see, on the same subject, *Lancashire & Yorkshire Ry. Co. v. Greenwood* (1888), L. R. 21 Q. B. Div. 215.

So far as I have observed, the English courts have never wavered upon the question of allowing the difference in freight charges to be recovered by the disfavored shipper, for violations of the Equality Clause of the act of 1845; nor ever sanctioned the view that there could be any other measure of damages. Nor can I find that any other measure of damages has been suggested for a violation of the act of 1854 in respect of a rate discrimination. The controversy about that act has been whether any suit could be maintained at all for a violation of it.

But, as this court has repeatedly pointed out, the provisions of the second section of the Interstate Commerce Act respecting equality of rates are modeled after the Equality Clause (§ 90) of the English act of 1845; while the third section of our Act is modeled after the English act of 1854.

In *Interstate Commerce Commission v. Balt. & Ohio R.*

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R., 145 U. S. 263, 277, etc., the court referred to the English acts, and some decisions of the English courts thereunder, saying (p. 284): "These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. *But so far as relates to the question of 'undue preference,' it may be presumed that Congress, in adopting the language of the English act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute. McDonald v. Hovey*, 110 U. S. 619."

In *Texas & Pacific Ry. v. Interstate Commerce Commission*, 162 U. S. 197, 222, the court (by Mr. Justice Shiras) said: "Similar legislation by the Parliament of England might render it profitable to examine some of the decisions of the courts of that country construing its provisions. In fact, the second section of our act was modeled upon section 90 of the English 'Railway Clauses Consolidation Act' of 1845, known as the 'Equality Clause,' and the third section of our act was modeled upon the second section of the English 'act for the better regulation of the traffic on railways and canals' of July 10, 1854, and the 11th section of the act of July 21, 1873, entitled—'An act to make better provisions for the carrying into effect the Railway and Canal Traffic Act, 1854, and for other purposes connected therewith.'"

In *Interstate Commerce Commission v. Del., Lack. & Western R. Co.*, 220 U. S. 235, 253, the court (by Mr. Chief Justice White) said: "*It is not open to question that the provisions of § 2 of the Act to Regulate Commerce were substantially taken from § 90 of the English Railway Clauses Consolidation Act of 1845, known as the Equality Clause. Texas & Pac. Railway v. Interstate Com. Com.*, 162 U. S. 197, 222. Certain also is it that at the time of the passage of the Act to Regulate Commerce that clause in the Eng-

lish act had been construed as only embracing circumstances concerning the carriage of the goods and not the person of the sender, or, in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated. It was therefore settled in England that the clause forbade the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others. *Great Western Ry. Co. v. Sutton* (1869), L. R. 4 H. L. 226; *Evershed v. London & N. W. R. Co.* (1878), 3 App. Cas. 1029; and *Denaby Main Colliery Co. v. Manchester &c. Ry. Co.* (1885), 11 App. Cas. 97. And it may not be doubted that the settled meaning which was affixed to the English Equality Clause at the time of the adoption of the Act to Regulate Commerce applies in construing the second section of that act, certainly to the extent that this interpretation is involved in the matter before us. *Wight v. United States*, 167 U. S. 512; *Interstate Commerce Commission v. Alabama M. R. Co.*, 168 U. S. 144, 166."

Now, what was the construction of the Equality Clause of the act of 1845, that had been adopted by the English courts, in the cases thus cited by this court as controlling evidence of what Congress intended in enacting the second section of our act?

The *Great Western Ry. Co. v. Sutton* (1869), L. R. 4 H. L. 226, was an action brought and judgment recovered for "the amount of certain alleged overcharges." But they were "overcharges" only in the sense that they were the differential between the rates charged to the plaintiff and those charged to others. The opinions of the judges being called for by the Lords, Mr. Justice Blackburn delivered the prevailing view, expounding the subject historically, as follows (p. 237): "At common law a person holding himself out as a common carrier of goods was not under

any obligation to treat all customers equally.¹ The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so) on being paid a *reasonable* compensation for so doing; and if the carrier refused to accept such goods, an action lay against him for so refusing; and if the customer, in order to induce the carrier to perform his duty, paid, under protest, a larger sum than was reasonable, *he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received, as being money extorted from him.* But the fact that the carrier charged others less, though it was evidence to show that the charge was unreasonable, was no more than evidence tending that way. There was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even *gratis*. All that the law required was, that he should not charge any more than was reasonable; see per Byles, J., in *Baxendale v. Eastern Counties Ry. Co.*, 4 C. B. (N. S.) 78; and per Willes, J., in *Branley v. Southeasiern Ry. Co.*, 12 C. B. (N. S.) 74. But when railways came into operation, and it was found that they practically superseded all other modes of transit, it became a question for the legislature how far they would, when granting numerous persons power to make a railway and act as carriers on that line, impose on them restrictions beyond what the common law imposed on ordinary carriers. At first the legislature in each special act inserted such clauses as seemed, to the particular committees, reasonable in each case. Very soon those came to be usual clauses which the then Chairman of Committees of the House of Lords used to require to be inserted in all railway bills with more

¹ NOTE: Otherwise in this country. *Interstate Commerce Commission v. B. & O. Railroad*, 145 U. S. 275, and other cases cit. *supra*.

or less modification. They were known by his name as 'Lord *Shaftesbury's* clauses.' Finally, in 1845, the legislature embodied in a general act (8 and 9 Vict., c. 20) those clauses which it was thought expedient should generally be inserted in railway acts."

Mr. Justice Blackburn, after referring to the special acts that governed the case (what, in this country, would be called the "charter" of the company), by one of which the act of 1845 was incorporated into it, and saying that the rights of the parties must depend upon the effect of certain other sections in conjunction with § 90 of the act of 1845, which was, to leave the company free to charge what it thought fit for parcels not exceeding five hundred pounds in weight, "subject, however, to the effect of the proviso for equality contained in the 90th section of the *Railway Clauses Consolidation Act*, 1845, and the similar proviso for equality contained in the former special act of this company (7 and 8 Vict., c. 3, sec. 50)," then proceeded to say:

"Then comes the question, what is the legal effect of this proviso for equality? I think it appears from the preamble of the 90th section of the *Railways Clauses Consolidation Act*, 1845, that the legislature was of opinion that the changed state of things arising from the general use of railways made it expedient to impose an obligation on railway companies acting as carriers beyond what is imposed on a carrier at common law. . . And if this be borne in mind, I think the construction of the proviso for equality is clear, and is, that the defendants may, subject to the limitations in their special Acts, charge what they think fit, but not more to one person than they, during the same time, charge to others under the same circumstances. And I think it follows from this that if the defendants do charge more to one person than they, during the same time, charge to others, the charge is, by virtue of the statute extortionate. And I think that the rights and remedies of a person made to pay a charge beyond the

limit of equality imposed by the statute on railway companies acting as carriers on their line must be *precisely the same as those of a person made to pay a charge beyond the limit imposed by the Common Law on ordinary carriers as being more than was reasonable. . . . When it is sought to show that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances.*¹ One single act of charging a person less on one particular occasion would not I think, make the higher charge to all others extortionate during all that day, or week, or month, or whatever the period might be. I think it would be *necessary to shew that there was a practice of carrying for some person or class of persons at the lower rate.* But a single instance would be evidence to prove this practice; and if followed up by shewing that the smaller charge was repeatedly made at intervals over a period of time, *the jurors would, in the absence of explanation, be justified in drawing, and would probably draw, the inference that the company during the period carried for others at that lower rate, and consequently that the higher charge was extortionate as being beyond the statutable limit of equality.*"

He then proceeds to show that the weight of authority was very much in favor of this view, citing many previous cases; and wherever the measure of recovery is referred to it is in such terms as these: "The excess might be recovered back under a count for money had and received," (p. 240); "the plaintiff recovered the overcharge under a count for money had and received," (pp. 241, 242). Referring to *Garton v. Bristol and Exeter Railway Co.* (1861), 1 B. & S.

(¹ NOTE: This sentence was quoted with approval by this court, in 145 U. S. 277.)

112, a case in which he had sat, he says (pp. 243): "If, as rather appears from the report to be the case, the decision went so far as to say that an action for money had and received would not lie where the overcharge was in breach of the statutable obligation to charge equally, as much as if it had been in breach of the common law obligation to charge reasonably, I think the decision was a mistake; and it was overruled in *Baxendale v. The Great Western Ry. Co.*, 16 C. B. (N. S.) 137, by the Court of Exchequer Chamber, which comprised three out of the four judges who took part in deciding *Garton v. The Bristol & Exeter Ry. Co.*, in the Queen's Bench."

He then reviews some later cases in which, for the first time, a difference of opinion had arisen, with the final result of concluding that the plaintiff was entitled to recover. Four other judges present concurred. Baron Bramwell (p. 250) alone took a different view; not, however, respecting the measure of damages, but upon the question whether the Equality Clause had been violated.

The House of Lords followed the majority of the judges and affirmed the judgment below, Lord Chelmsford delivering an elaborate opinion, in which, after discussing the evidence upon which the violation of the Equality Clause depended, he proceeded as follows (p. 262): "The last subject to be considered is the form of the action; *whether an action for money had and received will lie to recover back overcharges made upon the carriage of the plaintiff's goods, not absolutely but relatively to the charges made to other persons.* It was argued for the defendants that the charge upon the plaintiff's packed parcels, being warranted by the 10 and 11 Vict., ch. 226, and being reasonable, and within the absolute discretion of the company, the plaintiff was not injured by other persons being charged less than he was. But this is a fallacious way of viewing the question. The plaintiff's complaint is not that others are charged less than himself, but that *the fact*

of their having been charged less entitled him to claim the same rate of charge, and that all beyond that rate is overcharge. The very fact of the smaller charge to others is the ground of his complaint of an overcharge to himself. Now, if the defendants were bound to charge the plaintiff for the carriage of his goods a less sum, and they refused to carry them except upon payment of a greater sum, as he was compelled to pay the amount demanded, and could not otherwise have his goods carried, *the case falls within the principle of several decided cases, in which it has been held that money which a party had been wrongfully compelled to pay under circumstances in which he was unable to resist the imposition, may be recovered back in an action for money had and received.* In the language of the Court of Common Pleas, in the case of *Parker v. The Great Western Railway Company*, 7 Man. & G. 253—"The payments made by the plaintiff were not voluntary, but were made in order to induce the company to do that which they were bound to do without them." Lord Chelmsford proceeds then to cite other decisions, showing that the *Garton Case* was erroneously decided, and was overruled by the *Baxendale Case*.

London & North Western Ry. Co. v. Evershed (1878), L. R. 3 App. Cas. 1029; 5 Eng. Rul. Cas. 351; *was an action by a shipper to recover from the carrier an amount equivalent to the rebates given to another shipper in violation of the Equality Clause.* The House of Lords sustained the action, the Lord Chancellor (Ld. Cairns) saying (p. 1035): "The one right, to my mind, the clear and undoubted right, of a public trader is to see that he is receiving from a railway company equal treatment with other traders of the same kind doing the same business and supplying the same traffic. In my opinion that is not the case with regard to this plaintiff, and therefore I think he is entitled to recover the moneys he had paid under protest." Lord Hatherly said (p. 1035): "My Lords, I have come to

the same conclusion. I have been unable to see, since the beginning of the argument, in a case where there was this difference in the charge against the respondent, how it could possibly be said that the case comes within *the well-established construction of the provisions of the 90th section of the Railways Clauses Consolidation Act*. . . . (p. 1037). Therefore, I apprehend that your Lordships cannot possibly say that the appellants are entitled to make this distinctive charge and give to other traders a rebate without giving the respondent *a return of the money which he has so paid in excess of the charge to other people*. I think the money he has so paid, and paid under protest, can now be recovered back by him." It should be noted that the "protest" was of course not treated as a condition precedent to the recovery. The word was used merely to point out what payments were referred to; there having been, in fact, a protest in respect to the payments in question.

Denaby Main Colliery Co. v. Manchester, Sheffield & Lincolnshire Railway Co. (H. L. 1885), L. R. 11 App. Cas. 97, was an appeal from a decision of the Court of Appeal, reported in L. R. 14 Q. B. Div. 209; and the case came there from the Queen's Bench Division (*Matthew and Day, JJ.*), whose decision is reported L. R. 13 Q. B. Div. 674. The questions discussed in the Divisional Court were (a) whether certain "group rates" constituted a violation of the Equality Clause of the Consolidation Act, 1845, § 90, and, if so, whether the damages for breach of that enactment were *limited* to the amount of overcharges (and what was the measure of such overcharges), or whether *general damages* could also be recovered. (b) Whether an action lay for breach of the Railway and Canal Traffic Act, 1854, § 2, in view of the prohibition of § 6 of the same act; and, if so, whether the damages for breach of this act were limited to the amount of overcharges, or whether general damages could also be recovered. The "group rates" comprised the rates from

each of the collieries in a certain district, to a number of towns and places in various parts of England, and the coal going from any one of the collieries comprised in the group to any one of these towns and places must pass defendant's colliery, which was on the same line of railway. The judges held (13 Q. B. Div. 678) that the group rates were a violation of § 90 of the act of 1845, and that the overcharge could be recovered in accordance with *Evershed's Case*. This was on the ground that, in the absence of special circumstances to justify the same charge for carrying a greater distance for one customer than for another, there was a case of inequality within § 90 of the act of 1845. The question whether the damages for breach of that section were limited to the amount of overcharges, or whether general damages could also be recovered, was not answered, because there was in the statement of facts no ground upon which an action for general damages would be maintainable. With respect to the act of 1854, it was held that an action did not lie for anything done in contravention of that act, and that *Evershed's Case* was not an authority for such action, since the point was not presented there and no opinion was expressed upon it.

In the Court of Appeal (14 Q. B. Div. 209), the very special facts of the case are set forth. The court (*per* Lindley, L. J.) affirmed the judgment of the Queen's Bench Division that no action would lie in respect of any breach of the provisions of the Railway and Canal Traffic Act, 1854, § 2. Next, it was held that the "grouped rates" were not a violation of the act of 1845, because the termini were not the same; the reasoning being (p. 223) that the words "passing only over the same portion of the line" meant passing between the same points of departure and arrival, and passing over no other part of the line.

But it was held that the Company had violated the Equality Clause by charging to the defendant greater

rates than those charged to one Bannister; the coal in each case going from defendants' mine to Grimsby. As to this, the court proceeded to say (p. 226): "It remains only to consider what damages, if any, the defendants have sustained by reason of the company's reduction of their tolls, for the coal carried from the defendants' colliery for Bannister and shipped at Grimsby for the American steamers and for points south of Harwich. The defendants in fact sent no coals to Grimsby for such shipment, nor did they ever request the railway company to carry coals for such shipment. If they had, there is no reason to suppose that they would have been charged more than Bannister. . . . The fact, however, remains that at various times the railway company did carry coals to Grimsby for the defendants and Bannister, under the like circumstances, as regards trouble and cost to the company, and as regards coals got from the defendants' collieries over the same portion of the line; and the company did charge Bannister for the coals so carried for him less than they charged the defendants; and if the defendants had shown that they had thereby sustained pecuniary loss, they would have been entitled to recover damages in respect thereof. The Divisional Court has held the defendants entitled to recover overcharges made to the defendants on the principle laid down in *Evershed's Case*, i. e., the charges made to them in excess of the charges made to Bannister for similar services. But the court does not say on what quantity of coal, or on how much of the defendants' coal carried to Grimsby, this excess is to be calculated, and we are unable to see how the quantity is to be fixed. This difficulty did not arise in *Evershed's Case*; and the principle of that case seems to us inapplicable to the assessment of damages in this case. It cannot be right to calculate the amount of overcharge on all the coal sent by the defendants to Grimsby without reference to the quan-

tity on which, or the times during which, a less rate was charged to Bannister, and, as already stated, we do not see on what principle to fix the amount of alleged overcharge. Under the peculiar circumstances of this case the defendants have not shewn any grounds which will justify the court in holding the railway company liable to them for any overcharges or damages. There is, therefore, nothing to be ascertained by the arbitrator on this head."

In the House of Lords (11 App. Cas. 97), it was held, that where the railway company carried coal from a group of collieries situate at different points along their line, and charged all the collieries with one uniform set of rates in respect of such carriage, the owners of the colliery nearest to the point of arrival were not entitled to maintain an action for overcharges merely on the ground that the difference in distance showed that the same rate was a discrimination against the shorter haul. The Lords affirmed the decision of the Court of Appeal to the effect (a) that the railway had not in the above respect infringed the provisions of § 90 of the act of 1845. They affirmed the decision (b) that in this particular case an action would not lie for breach of the act of 1854, because undue or unreasonable preference or prejudice, within the meaning of that act, had not been proven. The question whether under any circumstances an action lies for breach of the act of 1854 was reserved. And (c) upon the question of the coal carried from the appellants' colliery to Grimsby at the same time that less rates were charged on Bannister's coal because of its ultimate destination for shipment on American steamers or for points south of Harwich, the House of Lords affirmed the judgment of the Court of Appeal that the allowances made to Bannister were a violation of the Equality Clause of the act of 1845.

But upon the now important question of damages the House of Lords (reversing the Court of Appeal) held that the appellants were entitled to recover the overcharges, the amount

to be ascertained by finding what quantity of coal carried under the same circumstances and over the same portion of the line was charged at the higher rate to the appellants at the time the lower rate was charged to Bannister.

There was a difference of opinion among the Law Lords as to whether the Colliery Company was entitled to recover the amount of the overcharge computed upon the entire tonnage transported for them, or only upon the less tonnage that had been carried at the reduced rate for Bannister during the same period. The Lord Chancellor (Halsbury) held to the former view; the Earl of Selborne and, apparently, Lord Blackburn, to the latter. In the end, the view of the Lord Chancellor prevailed. But the Lords all agreed that an inequality in the rates charged to two shippers for the same service was to be treated as conclusive evidence that the disfavored shipper had been overcharged; and that the rate differential—described as “overcharge”—was to be adopted as the measure of the compensation to be awarded for a violation of the Equality Clause.

The Lord Chancellor said (p. 112): “The remaining question, namely, what the appellants are entitled to recover from the company upon the hypothesis that they have been overcharged, is one which does not seem to me to be surrounded by the difficulty that has been assumed to exist. The arbitrator, to whom this question must go back, will be able to *find on what quantities of coal the appellants were charged, during the periods when the railway company were carrying for Bannister at a less rate; and if the principle is laid down by your Lordships that the appellant's coal ought to have been carried at the same rate, I am unable to see the difficulty of ascertaining the amount of overcharge.*”

The Earl of Selborne said upon this topic (p. 116): “I agree with the arbitrator in holding this to be a case of overcharge, and not a question of damages; and I should answer his question (upon the authority of *Sutton's Case*

and *Evershed's Case*, and of the opinion of Lord St. Leonards in *Finnie's Case*, 2 Macq. 186), by saying that the proper measure of the overcharge to the appellants is the difference between the amount charged to them, and that charged (after deducting the allowance) to Bannister, for coals carried over the same part of the railway and under the same circumstances, during the same periods of time. Is there, then, any insuperable difficulty arising out of the fact, that during these periods of time, not only coals on which these allowances were made, but also other coals, on which Bannister was charged the same rates with the appellants, were carried over the same distance, and under the same circumstances? I do not think so. *It being known how much coal was actually carried at the reduced rate for Bannister during these periods, it seems to me to result, from the principle established in the cases of Sutton and Evershed, that the appellants ought to have been charged at the same reduced rate up to, but not beyond, the same total quantity during the same period of time, and that this is the true measure of the overcharge, for which the arbitrator ought to give them credit. . . . I think (with the Court of Appeal) that there would be very great difficulty, if the principle of overcharge were rejected, in finding any other remedy by way of damages applicable to such a case."*

Lord Blackburn, after quoting what was said in the Court of Appeal (as quoted above), upon the question of damages, said (p. 124): "I am not satisfied with the way in which Lindley, L. J., deals with *Evershed's Case*, and the mode in which the Divisional Court had applied it. I think that it cannot be right to calculate the amount of overcharge on all the coal sent by the defendants from their colliery to Grimsby for shipment, without reference to the quantity of coal on which, or the time during which, the less rate was charged to Bannister for coal carried from the defendants' colliery. The arbitrator has not found, and I do not think he was bound to find in the

special case, what part of the coals carried by the railway were carried only over the same part of the railway with those carried for Bannister during the same time, so as to make this charge on these coals extortionate. I think when the case goes back he will have to find this in order to ascertain the amount, if any, which can be recovered back as overcharge."

Lord FitzGerald said simply (11 App. Cas. 125): "My Lords, I have read the two elaborate opinions which have been delivered by my noble and learned friend near me, and my noble and learned friend opposite, and I entirely concur in the order which it is proposed to make, and have nothing to add."

But the Syllabus (11 App. Cas. 98) expresses the view of the Lord Chancellor, and the order for judgment (p. 126) shows that this view prevailed.

The order was—"That the arbitrator must ascertain *what quantity of coal carried under the same circumstances and on the same portion only of the line was charged at the higher rate to the defendants at the time the lower rate was charged to Bannister*, the fact that the coal was shipped on the American steamboats or to the south of Harwich not being a difference in the circumstances; *and so ascertain the amount of the overcharge.*"

The very clear result of these three important decisions of the House of Lords was that the amount of the difference in rates was to be treated as so much money unlawfully exacted from the disfavored shipper, and recovered accordingly.

There is not the least doubt that Congress, in passing the Interstate Commerce Act, had in mind these then recent decisions of the English court of last resort, and intended to adopt the principle those cases had established with respect to the Equality Clause of the English act of 1845, viz., that just as, at the common law, a shipper who had been charged an unreasonable rate could recover back

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the excess, so under the statute he could treat lower rates customarily allowed to other shippers for the like service as conclusive evidence that he had been subjected to an overcharge, and recover the difference.

To this extent, at least, I deem the question of the measure of damages for unlawful discrimination, contrary to § 2 of the Interstate Commerce Act, to be covered by the previous decisions of this court, already cited (145 U. S. 283; 162 U. S. 222; 220 U. S. 253), which pointed out that the Equality Clause furnished the model for § 2 of the Interstate Commerce Act, and that it was adopted by Congress with the construction that had been put upon it by these same decisions of the House of Lords. Were the matter *res nova*, I should entertain no doubt of the propriety of adhering to the English rule.

Whether the House of Lords was right in the *Denaby Main Colliery Case* in allowing a recovery by the aggrieved shipper based upon the rate differential as applied to his entire tonnage, or whether it should have been limited to a tonnage not exceeding the tonnage of the favored shipper on which the rebate was allowed, if that was less than the tonnage of the aggrieved shipper, may be a question of some doubt. This court in the present case is not called upon to pass upon it.

For the record before us does not present the question whether the plaintiff's recovery ought to have been measured by the tonnage of the favored shippers upon which the rebates were allowed. The plaintiff in error (defendant in the trial court) did not prefer any request or take any exception that would have based the recovery upon a computation of the favored tonnage. There was no evidence, indeed, of the amount of that tonnage; it being simply made to appear that of all the coal shipped by the Berwind-White Company (one of the favored shippers) during the period of rebating, only 10 per centum was contract coal on which rebates were allowed. How much

the Berwind-White Company shipped did not appear, and so it may properly be presumed that 10 per centum of its shipments would amount to more than the total of the plaintiff's shipments.

Defendant did request the trial court to instruct the jury that if the lower rate accorded to other shippers was not justified, "the amount which the plaintiff is entitled to recover is measured by the difference between the rate per ton which it paid on all its shipments during such period, and the rate per ton which the other shipper paid on his or its whole volume of shipments during such period." This, as the Circuit Court of Appeals correctly held (173 Fed. Rep. 6), in effect requested the court to charge, as fixing the measure of recovery, not the lowest rate charged by the railroad to another shipper, but the general average paid on all shipments made by such shipper. I agree with that court in the view that Congress made no such rule. It is inconsistent with anything in the English cases, or in any case in this country to which attention is called.

The conclusion of this court that the right to recover in such a case as the present "is limited to the pecuniary loss suffered and proved," and that the fact that greater charges are exacted from the plaintiff than from his competitor for the like service is not evidence of such pecuniary loss, is, so far as I have been able to discover, entirely unsupported by authority. The *Parsons Case* (167 U. S. 447, 460) is cited as authority, but in my view is not properly to be so considered, for reasons already fully explained. The "only other case" is *Knudsen-Ferguson Fruit Co. v. Michigan Central R. Co.*, 148 Fed. Rep. 968, 974. This was an action to recover a sum claimed to have been unlawfully exacted for the icing of a carload of fruit. At p. 974 the court said, *arguendo*: "To support a recovery under this section [§ 8] there must be a showing of some specific pecuniary injury. . . . He [the

shipper] must show either that there has been some unreasonable or excessive charge imposed, or *some unlawful discrimination practiced against him.*" As this court holds that in the present case an unlawful discrimination was practiced against the shipper, I do not see anything in the *Knudsen Case* to deprive it of its right to recover, or to affect the question of damages. *Central Coal & Coke Co. v. Hartman*, 111 Fed. Rep. 96, and *Meeker v. Lehigh Valley R. Co.*, 183 Fed. Rep. 548, were actions to recover treble damages under the Sherman Anti-trust Act; in the latter case (p. 551) the court was careful to point out that the plaintiff was not seeking redress as a shipper, nor was the defendant sued as a carrier. *Hoover v. Pennsylvania R. Co.*, 156 Pa. St. 220, 224, was an action upon a Pennsylvania statute, not, like the Interstate Commerce Act, giving to the party injured a right of action for "damages sustained," but making the offending carrier "liable to the party injured for damages *treble* the amount of injury suffered." The court cited no authority for its decision that the difference in the freight rates did not furnish a measure for the amount of the single damages. Evidently because of the penal character of the remedy the court shrank from adopting what otherwise would be deemed the normal rule for determining the amount of the injury.

On the other hand, *Cook v. Chicago &c. Ry. Co.*, 81 Iowa, 551, 563, is a distinct authority for the proposition that in a case of discrimination in rates accomplished by means of rebating, the amount of the rebates furnishes the measure of damages; the court saying: "The only finding that can in any fairness be made is that after deducting the rebate the rate was reasonable; and that the exaction from the plaintiffs was unreasonable and the discrimination against them unjust." To the same effect is *Louisville &c. R. Co. v. Wilson*, 132 Indiana, 517, 525, where an instruction that the allowance of more favorable

rates to another shipper entitled the plaintiff to recover the difference, was sustained on appeal.

The present decision ignores the practical construction that has invariably been placed upon the act by the Interstate Commerce Commission.

In *Burgess v. Transcontinental Freight Bureau*, 13 I. C. C. 668, 680, the Commission ruled upon the precise question now before us, in dealing with a case of rates held excessive *per se*, but only so held as the result of a comparison between the rates under attack and other rates customarily charged. The complainants claimed reparation by reason of shipments under the old rate. Defendants denied that such reparation should be awarded, even though the Commission were of the opinion that that rate was excessive, and this "for the reason that no damage upon the part of the complainants has been established." It appeared that the market was not affected by the rate, and that the freight had been added to the price paid by the consumer; and it was insisted that the complainants who had paid this freight rate had not been actually injured. The Commission said: "Such is not, in our opinion, the proper meaning of this term [damage]. These complainants were shippers of hardwood lumber to this destination, and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was in fact exacted. They were thereby deprived of a legal right, and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay. If complainants were obliged to follow every transaction to its ultimate result, and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them. Certainly these defendants are not entitled to this money which they have taken from the complainants, and they ought not to be heard to say that they should not

be required to refund this amount because the complainants themselves may have obtained some portion of this sum from the consumer of the commodity transported."

It is upon this theory that reparation has been awarded by the Commission from the beginning. After an examination of the reports of their decisions as exhaustive as the time at my disposal would permit, I think it entirely safe to say that in the thousands of reparation cases that have been passed upon, reparation has not been refused under circumstances at all resembling those of the case at bar; and that wherever reparation has been allowed it has been based upon the rate differential, and awarded to the shipper who paid the freight, without regard to whether or not he charged it over against his consignee. The same rule has been adopted in all cases, whether the rates charged to the complainant have been deemed unreasonable *per se* or not; indeed, where they have been thus denounced it has ordinarily been done as the result of comparison between the rate under attack and other rates on similar traffic. Illustrative decisions are cited in the margin.¹

¹ Reparation by reason of published rates held unreasonable because discriminatory, irrespective of whether they were otherwise extortionate.

12 I. C. C. 418, 426; 14 I. C. C. 422, 434; 14 I. C. C. 523; 16 I. C. C. 528; 17 I. C. C. 578; 18 I. C. C. 259; 18 I. C. C. 212, 219; 18 I. C. C. 550; 18 I. C. C. 580.

By reason of published rates held unreasonable because in excess of rate afterwards voluntarily established by the carrier.

12 I. C. C. 13; 12 I. C. C. 141; 14 I. C. C. 118; 14 I. C. C. 577; 16 I. C. C. 190, 192; 16 I. C. C. 293; 16 I. C. C. 450; 20 I. C. C. 104.

By reason of published rates held unreasonable because in excess of rate afterwards established by the Commission.

12 I. C. C. 417; 14 I. C. C. 199, 205; 17 I. C. C. 251, 253; 17 I. C. C. 333; 18 I. C. C. 301.

By reason of rates held unreasonable because resulting from error in routing chargeable to the carrier.

14 I. C. C. 527; 18 I. C. C. 527.

This court, while saying very plainly what the word "damages" in § 8 *does not* mean, reaches its conclusion without determining what the word *does* mean. It is said that the "damages may be the same as the rebate, or less than the rebate, or many times greater than the rebate." It is said that in the case under consideration there was "no proof of injury, no proof of decrease in business, loss of profits, expense incurred, or damage of any sort suffered." It is said that "If plaintiff and one of the favored companies had both shipped coal to the same market on the same day, the rebate on contract coal may have given an advantage which may have prevented the plaintiff from selling, may have directly caused it expense, or may have diminished or totally destroyed its profits. The plaintiff, under the present statute, in any such case being then entitled to recover the full damages sustained." But as the contract coal of the favored shipper had been sold long before (prior to April 1, 1899, at latest), I am unable to see how it can reasonably be supposed that the rebate could have prevented the plaintiff from selling, or have caused it expense, or have diminished or destroyed its profits upon coal that happened to reach destination on the same day.

What, then, is to be the measure of damages? Whatever it is to be, it is apparent that we must henceforward abandon the simple and direct method of computing the

By reason of published rates held unreasonable *per se*.

14 I. C. C. 525; 14 I. C. C. 577; 16 I. C. C. 469; 20 I. C. C. 12; 20 I. C. C. 104; 22 I. C. C. 283.

By reason of published rates held unreasonable because higher than obtainable by another route.

12 I. C. C. 141.

By reason of published rates held unreasonable because exceeding the sum of the locals.

13 I. C. C. 154; 14 I. C. C. 336; 14 I. C. C. 549; 14 I. C. C. 573; 14 I. C. C. 579; 16 I. C. C. 293; 16 I. C. C. 318; 16 I. C. C. 339; 21 I. C. C. 215.

rate differentials, and therefrom ascertaining the amount of the reparation, and must enter into inquiries respecting the state of the market, and ascertain whether, upon the precise date that the goods of the injured party reached the market, goods of the like character owned by the favored shipper came into direct competition with them. All of this seems to me to be utterly impracticable, and I cannot believe that Congress intended any such result to follow from the language it employed.

It is said that under the rule of the *Denaby Colliery Case* it would follow that if there were, say, five dealers, each shipping 10,000 tons, to one only of whom rebates aggregating \$3,500 had been allowed, each of the five would be as much entitled as plaintiff to recover \$3,500 on their several shipments of 10,000 tons each, and the five verdicts would aggregate \$17,500 because of the payment of \$3,500 to the favored shipper. But if § 2 of the Act is to be given any vital force, it must be construed as estopping the carrier from saying that the amount actually charged, less the rebate, is less than ought to be charged on a shipment of 10,000 tons; and if he himself rebates \$3,500 to one shipper, the requirement that he rebate the same to each of the four others, does not penalize the carrier. It simply requires him to do service for all at the rate which he himself has fixed in dealing with the favored shipper.

Nor can I see that this would "create a legalized, but endless, chain of departures from the tariff." If § 2 is enforced strictly in accordance with the English rule it will very clearly tend to prevent any departures from the lawfully established tariffs.

It seems to me a strange view of the matter to deny direct reparation *in specie* to the aggrieved shipper, by the payment to him of an amount sufficient to leave the net rate charged to him equal to the lowest rate customarily charged to a competitor; and to base this denial on the theory that reparation will do more harm than good, by

creating an "endless chain of departures from the tariff." Of course, the result would be that if there were five shippers, and rebates were given to one of them unlawfully, and then by legal compulsion the carrier were required to give equivalent rebates to the others, this would constitute five "departures from the tariff" instead of one. But what matters it, provided the five shippers are thereby put upon an equal footing? The prohibition against rebates and other discriminations, and also the requirement of established and published rates, are intended to compel fair and equal treatment by the carrier of all shippers. I can see nothing in the act that makes published rates so sacred that departures from them by the carrier must go unredressed, because to redress the grievance will require a further departure. Equality in the treatment of shippers is the end aimed at by the act; published rates are but a means to that end. We should not so exalt the means as to lose sight of the end and object of the Act.

Besides, if the theory of the opinion is to be adhered to, there will necessarily be as many different rates as there are differences in the circumstances of the disfavored shippers who seek redress because of rebates or other rate discriminations. One aggrieved party may receive damages far beyond the money equivalent of the discrimination; another may receive much less; still another may receive nothing at all. If we were to look to the outcome of these private actions for violation of the equality provision of § 2 of the Act, and treat them as amounting in the end to a determination of the freight rate, the inevitable result (on the theory adopted by the court) would be that one violation by the carrier would result in as many different rates as there were different shippers to be discriminated against.

But, with great respect, I again ask: What, in the present case, is to be the measure of damages? The plaintiff, upon shipments aggregating 40,000 tons of coal in two years,

has been charged about \$12,000 more than its competitors have been charged during the same period for the same service. The plaintiff has actually paid the freight bills to the railroad company. Upon the face of the record, the plaintiff's expense account has been actually increased by the amount of \$6,000 per annum, as compared with its competitors. Other things being equal, the profits of the plaintiff, upon the production and sale of the 40,000 tons of coal, were \$12,000 less than otherwise they would have been. It does not appear that other things were not equal. Yet the decision is, that there is "no proof of injury, . . . expense incurred, or damage of any sort suffered." Is not the payment of a full freight bill, as compared with a reduced freight bill, an "expense incurred"? What other expense could be incurred by a shipper, attributable to a discrimination in rates?

The opinion says: "Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion. Having paid only the lawful rate, plaintiff was not overcharged, though the favored shipper was illegally undercharged." This is not only unsupported by authority, but is, I submit, inconsistent with the result reached in the present case. The court decides that the plaintiff is injured, and entitled to maintain an action against the carrier under § 8, because the carrier has collected less compensation from a favored shipper for the like service. The rebates were merely the device by which the discount from the published rates was accomplished. How can such an action lie at all, except that § 2 makes the published and otherwise lawful rates unlawful and extortionate when less rates are charged to favored shippers, through the device of rebates or otherwise? It seems a mere play upon words to say that "the favored shipper was illegally undercharged." Certainly it is not to *him* that the right of action is given by § 8. In short, the opinion treats the imposition of the "lawful

rates"—that is, the published rates—as unlawful for the purpose of establishing the *injuria*, but insists that they must be treated as lawful when we come to ascertain the *damnum*.

The result is, the legal paradox: *Injuria sine damno*. The plaintiff is wronged, but not harmed; it may sue, but may not recover.

If the rate differential is not a proper element of damages in actions brought in the courts, I suppose it will not be proper for the Commission to adhere to it. Yet the sheer impossibility of adopting any other measure of damages, in the multitude of reparation cases that the Commission has to deal with, is perfectly obvious.

The result, upon the whole, is a virtual denial of private remedy for the most common and harmful of those discriminations that the Interstate Commerce Act was designed to prevent and to redress.